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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 714

WALTER J. MacDONALD, TRUSTEE IN BANKRUPTCY OF CRAIG, REED & EMERSON, INC., PETITIONER,

vs.

PLYMOUTH COUNTY TRUST COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 19, 1932

CERTIORARI GRANTED MARCH 21, 1932

(36,528)

(36,528)

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[fol. 1] [Caption omitted]

IN UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS

No. 44210. In Bankruptcy

In the Matter of CRAIG, REED & EMERSON, INC., Bankrupt

ORDER OF REFERENCE—October 14, 1929

Whereas, Craig, Reed & Emerson, Inc., a corporation organized by law and having a principal place of business in Brockton, in the County of Plymouth and District aforesaid, on the fourteenth day of October, A. D. 1929 was duly adjudged a bankrupt upon a petition filed in this court against it on the twenty-eighth day of September, A. D. 1929, according to the provisions of the Acts of Congress relating to bankruptcy:

It is therefore ordered, that said matter be referred to C. P. Ryan, one of the referees in bankruptcy of this court, to take such further proceedings therein as are required by said acts; and that the said corporation shall attend [fol. 2] before said referee on the fourteenth day of October, and thenceforth shall submit to such orders as may be made by said referee or by this court relating to said bankruptcy.

Witness the Honorable James M. Morton, Jr., Judge of the said court, and the seal thereof, at Boston in said District, on the fourteenth day of October, A. D. 1929.

Mary E. Prendergast, Deputy Clerk. (Seal.)

IN UNITED STATES DISTRICT COURT

TRUSTEE'S SUBSTITUTE PETITION FOR RECOVERY OF PROPERTY PREFERENTIALLY TRANSFERRED—Filed April 14, 1930

Respectfully represents Walter J. MacDonald, of Brockton, and says:

(1) That on or about September 28, 1929, a creditors' petition in bankruptcy was filed in the District Court of the United States for the District of Massachusetts against

Craig, Reed & Emersor, Inc., then engaged in the manufacture of boots and shoes in the city of Brockton; and thereafter on or about the twenty-seventh day of November, 1929, the said company was adjudged a bankrupt. That on or about the twenty-seventh day of November, 1929, your petitioner was elected trustee of the said Craig, Reed & Emerson, Inc., and immediately qualified as such trustee by giving the bond required of him, and has, since his said election and qualification, continued to act as trustee, as aforesaid.

(2) That within four months prior to the twenty-eighth day of September, 1929, the date of the inception of these bankruptcy proceedings, the aforesaid bankrupt had on deposit at the Plymouth County Trust Company, a corporation duly organized by law and having an usual place of business in Brockton, in the County of Plymouth, the sum of $20,476.79 or thereabouts; and that the said Plymouth County Trust Company unlawfully and without right and with intent to prefer itself over the rest of the creditors, took, applied and charged off the said $20,476.79 against the within bankrupt's indebtedness to it, well knowing that [fol. 3] said act on its part would tend to prefer it over the rest of the creditors and well knowing that said bankrupt was insolvent at the time. And the Plymouth County Trust Company has refused and continues to refuse to turn over to your trustees the said amount of $20,476.79.

(3) And your petitioner further says that the sum of $20,476.79, or thereabouts, so deposited in the Plymouth County Trust Company aforesaid, was not accepted by the said Plymouth County Trust Company as a deposit or deposits in the usual course of its business but that it was accepted with the intent that it should be applied to the indebtedness of the bankrupt with it, the said Plymouth County Trust Company.

(4) That in pursuance of said scheme, deposits of checks in the sum of $15,100.78, made by the bankrupt herein on or about the twelfth day of July, 1928, were not accepted in the usual course of business but were immediately taken by said bankrupt and sent to the National City Bank of New York, on which they were drawn, for collection for the sole purpose of applying said amounts to the

bankrupt's indebtedness with it, the said Plymouth County Trust Company.

(5) That said section on the part of the Plymouth County Trust Company was part of a general scheme to prefer itself over the rest of the creditors of the said bankrupt concern.

(6) The assets of the said Craig, Reed & Emerson, Inc. are grossly insufficient to pay in full the indebtedness due and owing by it and proved against its estate.

Wherefore your petitioner prays that the application by the Plymouth County Trust Company aforesaid of the said sum of $20,476.79 be decreed to be preferential, and in violation of the provisions of the Bankruptcy Act of 1898, and the amendments thereto, and to be void as against the petitioner herein; and that the said Plymouth County Trust Company be ordered and directed to pay over forthwith unto your said trustee the sum of $20,476.79, with interest from the date or dates of its deposits in the said Plymouth County Trust Company; and any other sum that this court shall find was taken by the said Plymouth County Trust [fol. 4] Company and which constituted a preference, and for such other and further relief as to this Honorable Court may seem proper.

Walter J. MacDonald.

Filing of substitute petition assented to.
Herbert C. Thorndike, Attorney for Plymouth City Trust Company.

IN UNITED STATES DISTRICT COURT

REFEREE'S FINDING—July 29, 1930

This is a petition by the trustee of the estate of Craig, Reed & Emerson, Inc., bankrupt, in which he alleges that the Plymouth County Trust Company has received by way of preference sums of money which were in the custody of the Trust Company, and which it set off against amounts due to it from the bankrupt when the latter was insolvent and when the Trust Company knew it was insolvent.

The trust company waived objection to the jurisdiction of the referee in open court, and consented thereto, with the understanding the matter be tried under the rules of evidence applicable in a plenary suit.

The bankrupt was indebted to the trust company in the sum of $36,500 upon a note. The set-offs were made on July 12, July 13 and July 15, 1929. Adjudication was on November 27, 1929, upon a petition filed September 28, 1929. The total amount set off was $20,476.79. The bankrupt made an assignment for the benefit of its creditors to one Hall, assistant treasurer of the Trust Company, on July 16, 1929.

1. Insolvency

The bankrupt had been losing money in its business for several years. Auditor's statements showed an increasing deficit. The balance sheet statement for the year ending December 21, 1928, shows an operating loss for that year of $16,413.63. This statement does not show a balance sheet deficit, but the assets are valued therein far above their real worth. Under the date of August 21, 1929, the assignee, who as stated above was an officer of the [fol. 5] trust company, in a statement to the creditors showed a deficit of $82,485, with liabilities of $58,016.36. The assignee sold all the assets for $14,330.01, which he testified was a fair price. His opinion was based upon his own knowledge and the opinion of others, expert in the business.

Reference was had to the schedules. The assets on the date of the schedules were worth as much as on the date of the set-off, and the liabilities were the same. The schedules list the assets at $14,075.39 which is *often* deducting the set-off in question, and the liabilities at $62,279.90 after the same deduction. The assets were not and are not sufficient to pay the creditors in full.

In June, 1929 a meeting of stockholders of the bankrupt was had at which the president of the trust company was present. The purpose of the meeting was to determine if the bankrupt could continue. At that meeting it was decided to allow it to go on for a few months.

The loan in question in this proceeding was formerly a time loan, but on March 8, 1927 was charged to a demand loan. After that date, no payment was made on account of

it. It was considered by the trust company as a frozen loan. The bankrupt could pay nothing on it.

The bankrupt was insolvent on the dates of the set-offs in question.

2

The trust company knew the bankrupt was insolvent.

The president did not seek to enforce payment of the loan, because he knew the bankrupt could not pay it, or any part of it, the compulsion would "put it out of business". The loan and the affairs and condition of the bankrupt were discussed at many meetings of the directors of the trust company.

The president of the trust company attended the meeting of stockholders in July, 1929 where it was agreed to give the bankrupt more time. The trust company knew the bankrupt was "slipping", that it had lost money for several years. The president of the trust company knew that set-off of the deposits to payment of its debt meant bankruptcy of the debtor, or as he testified he knew "it would have to [fol. 6] make an assignment". Upon making the set-off, the bankrupt was called to the trust company "to make an assignment". The assignment was suggested by the officers of the trust company, and was executed immediately after the set-offs were made.

The president of the trust company very frankly testified that he knew that the bankrupt could not pay its note, that it was losing money, that it could not pay its bills, and while in his opinion insolvency is a doubtful word, he regarded it as insolvent.

The trust company knew the bankrupt was insolvent on the dates of the set-offs.

3

The trust company determined to set off the deposits against its loan on or before July 10, 1929.

On that date, the bookkeeper in charge of the bankrupt's account, at the direction of a vice-president of the trust company, made this notation on the ledger sheet: "Show all shecks and deposits to Mr. Crocker." The testimony concerning the date of this notation was contradictory. The bookkeeper testified she made this notation on July 10, but that if Mr. Crocker said it was on July 12 or July 13, she

would not say he was wrong, her best recollection, however, was that it was on July 10. The vice-president testified it was on July 15.

The ledger sheet has the notation under and above the entries of July 11, in a position which would be the most natural if made before that day. By "under" is meant that an item of $35 entered on July 11 was written partly on and after the first word of the notation.

Upon the testimony of the bookkeeper and from examination of the ledger sheet, I find that the notation was made on July 10, and on that date the trust company determined to set off the bankrupt's deposits against its indebtedness.

On July 10, there was a balance of $5,961.90. Of this sum and of the deposits on July 11, there were in collected funds $4,402.29 which could be set off, and of this amount, on July 12 $375 was applied to rent due to the trust company, and $4,027.29 was set off against its note. Although [fol. 7] the bankrupt was insolvent at the time, the trust company had the right to make these set-offs, as the money was on deposit when it determined to make them.

After July 10, namely on July 12 or 13, and July 15, there were deposits credited in the total amount of $16,108.49. These deposits were not received by the trust company in the ordinary course. They were taken with the intention of applying them as a set-off to its note indebtedness.

The bankrupt usually received payment of its accounts just prior to the middle of the month and the trust company knew it, and it was in anticipation of these receipts that the notation on the ledger sheets was ordered and the determination to set off made. The bankrupt was not notified by telephone or otherwise of the set off, but a letter was mailed by registered mail, dated July 13, calling the note for payment. This letter was not received by the bankrupt until July 17. Meanwhile, on July 15, by telephone, one of the officers of the bankrupt was called to the office of the trust company, and then for the first time was told of the set-offs. On that day he was asked to execute an assignment, but refused until another officer of the bankrupt returned to town on the next day. The latter officer protested the action of the trust company, but finally the assignment was executed.

That the trust company knew the effect of its action is manifest from the discussion with its attorney of the rights of labor and other priority creditors.

That it did not regard the transaction as an ordinary set-off is manifest from its method of dealing with one of the checks deposited—writing to its correspondent by special delivery followed up by a telegram of inquiry and by another special delivery letter. None of these communications were sent ordinarily.

I find that on July 10, 1929 and thereafter the bankrupt was insolvent; that the trust company knew it was insolvent; that the trust company did not accept the deposits amounting to $16,108.49 in the ordinary course of business, but with intent to apply them to its debts; that such application would result in the trust company receiving a greater per- [fol. 8] centage of its debt than other creditors; that such application constituted an unlawful preference.

An order will be entered in accordance with the findings herein made.

Charles P. Ryan, Referee in Bankruptcy.

IN UNITED STATES DISTRICT COURT

ORDER OF REFEREE—July 29, 1930

This matter came on to be heard upon the trustee's substitute petition in which it was alleged that Plymouth County Trust Company had within four months prior to date of adjudication received a preference in violation of the bankruptcy act, and praying (1) that certain set-offs made by the Plymouth County Trust Company be declared preferences and void; and (2) that the said Plymouth County Trust Company be ordered to turn over to the trustee the amount of said set-offs; and was heard upon the testimony of the parties and their witnesses, examination of books and vouchers, and was argued by counsel; and thereupon and upon consideration thereof it is

Ordered, adjudged and decreed that within four months prior to the filing of the petition herein the said Plymouth County Trust Company did set off against the indebtedness of the bankrupt to it the sum of $16,108.49; that said

set-off was a preference and void; and the said Plymouth County Trust Company is ordered to turn over to the trustee the said sum of $16,108.49 with interest thereon from November 27, 1929, the date of adjudication herein.

Charles P. Ryan, Referee in Bankruptcy.

IN UNITED STATES DISTRICT COURT

PETITION OF THE PLYMOUTH COUNTY TRUST COMPANY FOR REVIEW OF REFEREE'S ORDER—Filed August 11, 1930

Represents your petitioner, the Plymouth County Trust Company, a corporation duly organized by law, with a usual and principal place of business in the city of Brockton, that [fol. 9] the order entered on August 7, 1930, adjudging and decreeing that the set-off of $16,108.49 was a preference and void, was erroneous, and your petitioner desires a review of the aforesaid order.

Wherefore your petitioner, being aggrieved by said order entered on August 7, 1930, prays that the same may be reviewed, and that the referee shall forthwith certify the same to the District Court, together with a summary of the evidence relating thereto, and his finding and order thereon.

Plymouth County Trust Company, by its Attorneys,
Joseph B. Jacobs, Jacobs & Jacobs.

IN UNITED STATES DISTRICT COURT

TRUSTEE'S PETITION FOR REVIEW OF REFEREE'S ORDER—Filed August 15, 1930

Respectfully represents Walter J. MacDonald, the duly appointed, qualified and acting trustee in the foregoing matter, and says that he is aggrieved by reason of a certain order entered by the referee in these proceedings under date of August 7, 1930, and that such order was and is erroneous in that

(1) The referee erred in finding or ruling that the appropriation by the Plymouth County Trust Company on July 12, 1929, of the sum of $4,027.29, then standing to the credit in that bank of Craig, Reed & Emerson, Inc., was not a preferential transfer;

(2) The referee erred in refusing or failing to find or rule that the appropriation by the Plymouth County Trust Company on July 12, 1929, of the sum of $4,027.29, then standing to the credit in that bank of Craig, Reed & Emerson, Inc., was a preferential transfer;

(3) The referee erred in refusing or failing to find or rule that the appropriation by the Plymouth County Trust Company on July 12, 1929, of the sum of $375, then standing to the credit in that bank of the said bankrupt company, was a preferential transfer;

(4) The referee erred in refusing or failing to rule or order that the claim of the Plymouth County Trust Company, heretofore filed in these proceedings, be expunged;

[fol. 10] (5) And for such other and further reasons as may hereafter be assigned.

Wherefore your petitioner prays that the said order may be reviewed in accordance with the provisions of the bankruptcy act of 1898 and amendments thereto and general orders.

Walter J. MacDonald, Trustee in Bankruptcy.

Duly sworn to by Walter J. MacDonald. Jurat omitted in printing.

In United States District Court

Referee's Certificate to Judge—December 10, 1929

I, Charles P. Ryan, one of the referees in bankruptcy for said district, do hereby certify that in the administration of the said estate the following questions arose:

At the first meeting of creditors objections were made to the allowance of the following claims: Andrews-Electric Company, H. H. Arnold, Inc., Atlas Tack Corporation, Claim of Berger, Donnelly Machine Company, Earle Shoe

Pattern Company, Claim of Orcutt, W. J. Mullins, Eastern Blacking Company, Brockton Transportation Company, Francis R. Drake, Brockton Last Company, Western Union, [fol. 11] Charles T. Simmons, Joseph Stone Cut Sole Company, Fred Thompson, Whitman Shoe Polish Company, Mina E. Woodsum, Willard H. Thayer, Twoomey Leather Company, Crown Leather Finish Company, M. J. Ellis & Co.

The objection was based upon the fact, and the inferences therefrom, that the affidavit accompanying said proofs was made before Loring H. Hall, a notary public. Mr. Hall is the treasurer of the Plymouth County Trust Company. The Plymouth County Trust Company is the largest creditor of the bankrupt. Prior to the bankruptcy an assignment for the benefit of creditors was made to Mr. Hall as assignee. I was asked to infer from the fact that Mr. Hall took the oath to these several proofs and from the other facts above alleged that he solicited the claims for the purpose of controlling the election of a trustee. On the other hand, the statement was made that the creditors sought Mr. Hall for his assistance in proving their claims. There was no testimony to support either contention. I found it is reasonable to believe that the creditors sought Mr. Hall as that Mr. Hall sought the creditors.

At the said first meeting twenty creditors whose claims amounted to $19,019.13 voted for Harry T. Talty as trustee. Seventy-three creditors whose claims amounted to $36,464.84 voted for Walter J. MacDonald, Esq., as trustee. In the petition for review it is stated that objection was made to the allowance of the claim of Plymouth County Trust Company in the sum of $16,235.71. I recall no objection to the proof as stated. However, if said claim were not allowed there would still be a majority in number and amount for Mr. MacDonald.

Objection was made to the approval of the appointment of Mr. MacDonald based upon the following facts which were in evidence upon the statement of counsel:

[fol. 12] The Plymouth County Trust Company is the largest creditor of the bankrupt and was the owner of real estate occupied by the bankrupt. Shortly before the adjudication checks for the rent of the said real estate were paid. At about the same time a large deposit was made

by the bankrupt in the trust company. Immediately, the trust company set off more than $20,000 of the amount so deposited upon a note then overdue. Two days later an assignment was made to Loring H. Hall, treasurer of the Plymouth County Trust Company, for the benefit of creditors. He was requested to associate others with him as assignee, but he declined to do so. A sale of the assets of the bankrupt was arranged to one Davis, a stockholder of the Plymouth County Trust Company, for a sum sufficient to pay 25 percent to creditors. This was not acceptable and adjudication in bankruptcy followed. There is a question upon the validity of the set-off above mentioned. Herbert L. Thorndike, Esq., is the attorney for the Plymouth County Trust Company, and for the creditors who constituted the majority and number voting at the first meeting. The votes were for Walter J. MacDonald, Esq. Mr. MacDonald shares occupancy of the offices occupied by Mr. Thorndike. He is not a partner, nor an employee of Mr. Thorndike. Occasionally he performs services for him for which he is paid. He is independent of Mr. Thorndike in every way except as above stated. He is in no way connected with Mr. Hall or the Plymouth County Trust Company. In open court he stated that there was no circumstance that would prevent him from attacking any alleged preference to the Plymouth County Trust Company, or from acting solely for the interests of the bankrupt estate in all matters. To what was stated by counsel and by Mr. MacDonald is added my own knowledge of his character and ability. I approved the appointment.

The matter is certified to the judge for his opinion.

Respectfully submitted.

Charles P. Ryan, Referee in Bankruptcy.

Fall River, December 9, 1929.

[fol. 13] IN UNITED STATES DISTRICT COURT

MOTION OF PLYMOUTH COUNTY TRUST COMPANY TO RECOMMIT THE REFEREE'S CERTIFICATE—Filed October 27, 1930

Represents your petitioner, the Plymouth County Trust Company, that on the fourteenth day of May, 1930, a hear-

ing was had before the Honorable Charles P. Ryan, referee in bankruptcy, on the trustee's substitute petition to have the Plymouth County Trust Company turn over to the trustee approximately $20,476.79.

That said petition was heard before the aforesaid referee Ryan under an agreement that said matter would be heard in the same manner, and in accordance with the same rule as if a plenary suit had been brought.

That if a plenary suit had been brought in this court, the appealing party would have had the right to have the appellate court review all the evidence, and the record would have contained either in question and answer form, or in narrative form, a record of all the testimony.

That the referee has made findings of fact which your petitioner believes are not justified by the evidence.

That before making his findings of fact or filing his final certificate, the referee submitted a draft report in which he stated that in June there had been a meeting of creditors of the bankrupt at which the president of your petitioner was present. Upon his attention being called to this manifest error, the referee changed his report to read: "In June 1929, a meeting of stockholders of the bankrupt was had," which your petitioner says is not justified by the evidence.

That the referee in his original draft of the report found that there was a deposit of $15,100.78 made on July 13. Exhibit 5, which was the original deposit slip, was called to the referee's attention, and he changed his finding to read that "on July 11th, there was a deposit of $15,100.78 in the branch at which the bankrupt made its deposits, which were not credited to the bankrupt's account until July 13th." The true facts are that four out of town checks were de-
[fol. 14] posited in the branch of your petitioner on July 11th,, and they were offset on July 12th, although the bookkeeping entry was not made until a later date, until the bank found out whether the checks were good.

That the referee found that said deposit of $15,100.78 was made after a notation was placed on the ledger card "to show all checks and deposits thereafter to" the vice-president of the trust company, and that said notation was made "on or before July 19, 1929."

Your petitioner believes that the testimony in the case does not warrant any such finding. That the only evidence in the case was the ledger card itself, which was an exhibit,

and the testimony of the bookkeeper of the trust company, who testified on cross examination as follows:

Q. Then you really haven't any definite recollection as to dates?

A. No, sir.

Q. You have no way of fixing the exact date when you wrote it on there?

A. No, sir.

Q. And you can't tell us whether it was the 10th, 11th, 12th, 13th or 15th?

A. No, sir, I can't tell the exact date.

The only other testimony was the testimony of Mr. Crocker, the vice-president of the trust company, who testified as follows:

Q. And, Mr. Crocker, you are quite sure that this pencil notation on Exhibit 6 "Show all checks and deposits to Mr. Croker" was put on some time after July 13th?

A. Yes, sir.

And Mr. Crocker further testified that this notation had reference to laborers' checks which might subsequently be presented for payment.

And your petitioner further says that there are many other inconsistencies between the evidence presented and the statement of the evidence as set forth in the referee's certificate.

And your petitioner believes that it is entitled, under Bankruptcy Rule No. 23 of this court, to have the transcript of the evidence and the exhibits made part of the [fol. 15] record for the consideration of this court, or is entitled to have the transcript of the evidence and the exhibits made part of the referee's certificate.

Wherefore your petitioner prays:

First. That an order be entered directing the referee to include a transcript of the evidence and the exhibits as part of his certificate of review.

Second. That the court issue an order that a transcript of the evidence and the exhibits be produced for use of the court at the hearing on the petition for review, and made part of the record of the case.

Third. And for such other relief as the court deems just and proper.

Plymouth County Trust Company, by Its Attorney, Joseph B. Jacobs.

Subscribed and sworn to before me this twenty-seventh day of October, 1930. Emma Leitiger, Notary Public.

IN UNITED STATES DISTRICT COURT

ORDER GRANTING MOTION TO RECOMMIT

LOWELL, J.:

Upon the foregoing motion after hearing Joseph B. Jacobs, Esq., of counsel for petitioner, and Robert A. B. Cook, Esq., of counsel for trustee: It is ordered that said motion be and it hereby is granted.

By order of court November 5, 1930.

Mary E. Prendergast, Deputy Clerk.

IN UNITED STATES DISTRICT COURT

REFEREE'S AMENDED CERTIFICATE—October 27, 1930

I, Charles J. Ryan, one of the referees in bankruptcy for the district, do hereby certify that in the course of the administration of this estate a question arose as to whether or not a set-off by the Plymouth County Trust Company in the sum of $20,476.79 on deposit with the said trust company against an indebtedness of the bankrupt upon a note of $36,500 was an unlawful preference and void, [fol. 16] and whether the said Plymouth County Trust Company should be ordered to turn over to the trustee the amount of said set-off.

The evidence showed that the bankrupt was a corporation engaged in the manufacture of shoes in the City of Brockton; that on March 8, 1927, it was indebted to the Plymouth County Trust Company for a balance due upon a time note of $36,500; that on that date the time note was changed to

a demand note, and no payment was made on account of it up to the date of the set-off, which was about twenty-eight months later; that the bankrupt could make no payment upon said note, and the Plymouth County Trust Company knew that it could make no payment; that no effort was made to compel the payment because of the fact that the trust company officials knew that it would be of no avail; that the trust company regarded it as a frozen loan; that the bankrupt had been losing money in its business for several years and the trust company knew it; that its balance-sheet statements made by an accountant who took his figures from the books of the bankrupt showed an increasing deficit.

That in June, 1929, a meeting of stockholders of the bankrupt was held at which the trust company was represented by its president; that the purpose of the meeting was to determine if the bankrupt could continue longer in business; that the stockholders determined at that conference to allow the bankrupt to continue in business for three months; that on July 16, 1929, an assignment was made by the bankrupt for the benefit of its creditors to an assistant treasurer of the trust company.

That the assignee prepared a statement of the assets and liabilities for the creditors which was disclosed to the creditors on August 21, 1929, and which showed that the bankrupt owed $58,016.36; that the assets set forth in the statement were $88,531.36; that the assignee found that the stock in process of the bankrupt was of small value; that the book value of the equipment was much in excess of the actual value; that the assignee sold all the assets of the bankrupt for $14,330.01.

That the assignment for the benefit of creditors was made [fol. 17] immediately after the set-off in quesiton, and after the account was closed by the trust company; that the assets which were on hand on the dates of the set-offs in dispute were as valuable when sold by the assignee as they were on the former date; that the assignee sold them for $14,330.01, which, in his opinion and in the opinion of others expert in the business, was a fair price; that the assets on the date of the schedules in bankruptcy were worth as much as on the date of the set-offs, and they were listed on the schedule for $14,075.39; that the liabilities scheduled were $62,279.90, and they were of at least that amount on

the date of the set-off; that the president of the trust company knew the effect of the set-off would be that the bankrupt would have to "make an assignment"; that the set-offs were on July 12, 13 and 15, 1929, which was within four months of the filing of the petition herein on September 28, 1929.

That on or before July 10, 1929, the vice-president of the trust company instructed the bookkeeper in charge of the bankrupt's account to show all checks and deposits thereafter to him; that on and after July 13, 1929, checks amounting to $6,170.94 issued by the bankrupt were refused payment by the trust company; that the instruction to the bookkeeper was noted by her upon the ledger sheet containing the bankrupt's account.

That said notation was made prior to July 11, 1929, according to the ledger sheet; that the balance of the bankrupt on deposit on July 10, 1929, was $6,961.90; that on July 12, there was set off from this deposit $375 for rent due by the bankrupt to the trust company, and on the same date $4,027.29, being all the collected funds then on deposit, were set off; that on July 11 there was a deposit of $15,100.78 in the branch at which the bankrupt made its deposits which was not credited to the bankrupt's account until July 13.

That all moneys deposited were forwarded to the main office at the close of business of the day of deposit at the branch; that whether deposited at the branch or at the main office the funds came into the custody of the trust company when deposited; that no actual notice of the first set-off on July 12 was received by the bankrupt until July 15; that on [fol 18] July 13, a letter was sent by registered mail saying nothing specifically about the set-off, but notifying the bankrupt that the note was called for payment; that this letter was not received by the bankrupt until July 17; that the deposit of $15,100.78 was received after the notation above referred to was made on the ledger account of the bankrupt, and was not credited until after the set-off was made on July 12; that thereafter on July 15 two deposits of $347.76 and $316.56, respectively, were made by the bankrupt.

That when the deposits after July 10 were made by the bankrupt it had no knowledge that its loan was called, or that its deposit was to be set off; that there was a discussion amongst the officers of the trust company as to the amount of the set-off, and it was decided to leave a sufficient sum to

take care of the pay-roll on the ground that wage claims would have priority; that when the check for $15,100.78 was received it was sent to the correspondent of the trust company in New York by special delivery mail with instructions to wire advice immediately; that this letter was dated July 12, 1929; the deposit was not credited until July 13, 1929, because the trust company wished to have it collected before crediting it; that the letter was followed by a telegram to the correspondent on July 13, and also by another letter on the same date asking the correspondent to wire; that this was an unusual way of dealing with such a transaction.

That on July 15 the bankrupt was notified by telephone of the set-offs; that one of the officers of the bankrupt went to the trust company and was asked to execute an assignment for the benefit of the creditors; that he declined until another officer returned the next day; that on the next day the other officer of the bankrupt corporation went to the trust company and after a discussion, in which he protested against the action of the trust company, an assignment for the benefit of the creditors was executed; that the assignment was made to an officer of the trust company; than an offer was made to the creditors which was declined; that the assignee sold the assets the day before the petition was filed herein; that the assignment for the benefit of the creditors was made at the request of the trust company, and the [fol. 19] trust company's officers knew that the set off would prevent the bankrupt from continuing in business and from paying its creditors in full; that by reason of the set off the trust company would receive a much larger percentage of its debt than the other creditors of the bankrupt; that the greater amount of the deposits of the bankrupt were made about the middle of the month when it collected its accounts.

In the course of the hearing the following objections were made of the omission and exclusion of testimony and exceptions noted:

Loring H. Hall, assistant treasurer of the Plymouth County Trust Company and assignee of the bankrupt for the benefit of creditors, testified that he prepared a statement of the liabilities from the books of the bankrupt and believed it to be correct. He was asked: "How much were

the liabilities?" Over objection, he was permitted to answer "$171,016.36".

Mr. Hall testified further that he sold the assets as assignee on September 27, 1929. The bill of sale was offered in evidence and, over objection, it was admitted. The following testimony was admitted over objection:

Q. "When did you first learn an assignment was to be made to you?"

Over objection, he was permitted to answer.

A. "July 16, 1929."
Q. "Where were you told that you were to be assignee?"
A. "At the Trust Company."
Q. "What was said at the time of the assignment when the bankrupt's officers were present?"
A. "Somebody told me I was to be assignee."
Q. "Was the method of handling the deposit of $15,100.78 the only time a deposit of the bankrupt was so handled?"
A. "Yes."

He testified that on July 13, 1929, two checks were protested because of "uncollected funds".

[fol. 20] Q. "Was it true?"
A. "Yes."

He testified that he talked with bankrupt's officers later on July 16. He was asked:

Q. "What was said?"
A. "General talk about the papers."

It appeared that one Edgar B. Davis is a director of the Plymouth County Trust Company and of the Plymouth County Development Company; that the assets were purchased from the bankrupt by a new company through a Mr. Hogan, also connected with the Plymouth County Development Company.

Alvah E. Reed, vice-president of the bankrupt, was asked:

Q. "Whose money was used?"
A. "The money of the Development Company."
Q. "Was it furnished by Edgar R. Davis?"
A. "I do not know."

Q. "Is Mr. Davis financially interested in the new company?"
A. "Yes."

Joseph C. Crocker, president of the trust company, testified that the Plymouth County Development Company is a stockholder of the trust company. He was asked:

Q. "When did the Development Company become a stockholder?"
A. "About four years ago."
Q. "When the Development — became a stockholder did you become president?"
A. "Yes."

Charles P. Ryan, Referee in Bankruptcy.

Fall River, October 18, 1930.

IN UNITED STATES DISTRICT COURT

REFEREE'S AMENDED CERTIFICATE—November 20, 1930.

I, Charles P. Ryan, one of the referees in bankruptcy for said district, in accordance with the order of the court, do herewith return to the court my original certificate upon the petition for review filed by the Plymouth County Trust Company together with a transcript of the testimony as furnished by a stenographer employed by the parties, modi- [fol. 21] fied and corrected by the insertion of a copy of my notes of the testimony of Evelyn M. Mills.
Respectfully submitted.

Charles P. Ryan, Referee in Bankruptcy.

IN UNITED STATES DISTRICT COURT

DECREE ON CERTIFIED QUESTION—Filed January 19, 1931

At Boston, in said district, on the nineteenth day of January, A. D. 1931, upon the question certified to the court by the referee in said matter on the eighteenth day of October, A. D., 1931, now therefore, after hearing argu-

ments of Joseph B. Jacobs, Esq., of counsel for Plymouth County Trust Company, creditor, and of Robert A. B. Cook, Esq., of counsel for the trustee in bankruptcy, now after due consideration of the same,

It is hereby ordered and decreed that the Plymouth County Trust Company forthwith pay to the trustee, Walter J. MacDonald, the sum of twenty thousand four hundred seventy-six dollars and seventy-nine cents ($20,476.79) with interest from December 3, 1929.

It is further ordered that the clerk send a copy of this order by mail to the referee.

Witness the Honorable James A. Lowell, Judge of said court, and the seal thereof, this nineteenth day of January, A. D. 1931.

Mary E. Prendergast, Deputy Clerk. (Seal.)

IN UNITED STATES DISTRICT COURT

OPINION—January 15, 1931

LOWELL, J.:

This proceeding by a trustee in bankruptcy to recover a preference was brought by a petition before Mr. Referee Ryan. The defendant consented to the jurisdiction of the referee, but, his decision being adverse, it now contends that the referee was incompetent to try the case even with its consent. "Second thoughts are best" is a good maxim, though its application here if unsportsmanlike. The contention is without merit. Section 23b gives power to [fol. 22] "courts" by consent, and "court" may include the referee (Section 1).

The point has often been assumed or mentioned in obiter dicta, though apparently not adjudicated.

See

Harrison v. Chamberlin, 271 U. S. 191.
Foster v. Manufacturers' Finance Co., 22 F. (2d) 609.

The bankrupt had been a depositor with the defendant for many years. It had borrowed money from it in the past on time loans, which it had been unable to repay. Two

years before the bankruptcy these loans were changed into demand loans. In June, 1929, the bankrupt being in failing circumstances, a conference was held between the officers of the bankrupt and certain creditors to consider what should be done. At this conference it was decided that the bankrupt should be allowed to go on making shoes to see if it could pull through. The president of the defendant was present at this conference, though he took no part in the public discussion. There was conflicting evidence as to whether he made a side remark to the effect that the bank would give the bankrupt more time. On July 11 the bankrupt deposited in the Campello branch three checks aggregating $15,100.78. On the morning of the 12th of July these checks had been sent to the main office, and then the bank set off against the demand notes the sum of $4,027.29, and thereafter honored only checks for wages, which it did under the advice of counsel that wage payments would be preferred under an assignment for the benefit of creditors. A day later, when the bank had discovered that the checks for $15,100.78 were good, it set off this amount against the demand notes, and two days after that it set off two further sums of $347.76 and $1,000.96. On July 13th the bank wrote to the bankrupt informing it of what had been done. The bankrupt vainly protested. It was told that it must make an assignment for the benefit of creditors. This assignment was drawn up by the bank's attorney, one of the subordinate officers of the bank being the assignee. The assignee proceeded to wind up the affairs of the concern, and about two months later the petition in bankruptcy was [fol. 23] filed. At some time between July 10th and July 14th the following entry was made on the ledger card: "Show all checks to Mr. Crocker." (Crocker was the vice-president of the bank.) The evidence as to when this entry was made was conflicting, the bookkeeper saying that it was made on July 10th, Mr. Crocker saying July 15th.

The referee ruled that the first set-off of $4,027.29 was valid, but that the others constituted preferences. He allowed interest on the amount found due from the date of the filing of the petition in bankruptcy. Both parties petitioned for a review, the defendant contending that the referee was wrong in not allowing all set-offs, and the trustee contending that he was wrong in allowing the first set-off.

There is no question that on July 12th the defendant knew that the bankrupt was insolvent and that the set-off would give it a larger percentage of its debt than other creditors. The defendant insists that as the deposit of $15,000 was in the usual course of business, there can be no preference, as under those circumstances the bank had the right of set-off. It is true that the deposit was in the usual course of business; but that course of business could be kept up only as long as the defendant allowed it to continue. By its own act of making the first set-off and refusing to pay checks, it thereby changed the ordinary relation of banker and depositor. While there was no proof of collusion between the parties, the evidence shows that the bank allowed the bankrupt to continue in business with the intention, formed either in June, or at any rate in July, of thereby getting a greater share of the bankrupt's property than other creditors.

Every deposit made by the bankrupt after the conference in June was a transfer which carried with it the potentiality of a preference. The remark of the court in Bank v. Massey, 192 U. S. 138, much relied on by the defendant, that a deposit in a bank does not decrease the assets of a depositor, is true; but the statement was made in connection only with the ordinary relation of a banker and depositor, where the depositor gets in return for his deposit the obligation of the bank to repay him. The set-offs here in question diminish the estate of the bankrupt, because [fol. 24] they allocate to the bank a part of its property which should be divided among all creditors. All the deposits made after the conference in June come within Judge Morton's lucid statement of the law:

"Although a depositor may be insolvent, and may be known by the bank to be insolvent at the time when a deposit is made, the bank is still entitled to apply the deposit on its claim. It is only when aqairs have reached such a point that both parties to the deposit know, or as reasonable persons are bound to know, that the effect of making it will in all probability be to give the bank an advantage through its right of set-off, that the deposit and the subsequent application of its amount to a recoverable preference." Bailey v. Merrimack Bank, 283 F. 514, 516.

The learned referee apparently thought that the date of the entry on the ledger card was of importance, but it makes no difference whether the entry,—"Show all checks to Mr. Crocker",—was made on the 10th or the 15th. Actions speak louder than words, even than written ones.

The ruling of the referee as to the three last set-offs is affirmed. As to the matter of interest on this amount, I think that he was in error. Interest is not usually allowed before a demand. In this case there was no demand, and interest should run from the date of the filing of the petition to recover the preference. Kaufman v. Treadway, 195 U. S. 271. As to the first-set-off of $4,000, I find that the referee was in error and it should not have been allowed.

Let a decree be entered for the petitioner in the sum of $20,476.79, with interest from December 5, 1929.

IN UNITED STATES DISTRICT COURT

Statement of Evidence

Mr. Jacobs: If we are to consent to jurisdiction here, I had supposed there was absolutely no question whatever as to your Honor's hearing this case in all its phases and trying it as a plenary suit.

[fol. 25] Mr. Cook: If there is any question to be raised about the jurisdiction, I want that question to come forward now.

Mr. Jacobs: There is no question about the jurisdiction but we don't waive any rules of evidence in a plenary suit. We consent to the jurisdiction with the understanding that it is to be tried under the rules of evidence in a plenary suit.

LORING H. HALL (sworn).

Direct examination.

By Mr. Cook:

Q. 1. You are Loring H. Hall?
A. Yes, sir.
Q. 2. You live at 95 Echo Street, Brockton?
A. Yes, sir.

Q. 3. You are the assistant treasurer of the Plymouth County Trust Company?

A. Yes, sir

Q. 4. I believe you have been in the employ of the bank for some considerable period?

A. Yes, sir.

Q. 5. How long, Mr. Hall?

A. Sixteen years last February.

Q. 6. How long have you been assistant treasurer?

A. Approximately ten years.

Q. 7. You were the common law assignee, were you not?

A. Yes, sir.

Q. 8. Of Craig, Reed & Emerson, Inc.?

A. Yes, sir.

Q. 9. That assignment was made to you on July 16th, 1929; is that correct?

A. May I consult my records as to the date?

Q. 9a. Yes.

A. Yes, sir.

Q. 10. And recorded the next day, the 17th?

A. Yes, sir.

Q. 11. As assignee, Mr. Hall, what property did you become possessed of, the Craig, Reed & Emerson Company?

A. The assets and liabilities of the Craig, Reed & Emerson Company.

Q. 12. I asked about the property; what did the assets consist of? What did you take over?

A. Cash; accounts receivable; inventory; merchandise inventory; machinery and equipment.

Q. 13. Liabilities of the company at that time amounted to what, Mr. Hall?

[Objected to by Mr. Jacobs. Objection sustained.]

Q. 14. Did you prepare a statement of the liabilities from the books of the company?

A. Yes.

[fol. 26] Q. 15. Have you the statement before you?

A. Yes, sir.

Q. 16. Is this a correct statement of the liabilities of the company?

A. As disclosed by the bookkeeper who handled the books.

Q. 17. As disclosed to you as assignee?

A. Yes, sir.

Q. 18. You made endeavors as assignee to find out if this is correct?

A. As far as I know, they are correct; yes.

Q. 19. Tell me what the liabilities show.

[Objected to by Mr. Jacobs. Objection overruled. Exception noted.]

A. $171,016.36.

Q. 20. Was there any capital stock included?

A. Yes, sir.

Q. 21. What was the amount?

A. $113,000.

Q. 22. What was the actual indebtedness?

A. $58,016.36.

Q. 23. Is that the correct amount?

A. Yes, sir.

Q. 24. Notes payable, accounts payable and accrued wages?

A. Yes, sir.

Q. 25. These debts were due and owing as of the date of the assignment?

[Objected to by Mr. Jacobs. Objection sustained.]

Q. 26. Will you tell us the amount of the debts that were due and owing as of the date of the assignment?

[Objected to by Mr. Jacobs.]

A. I can't, sir.

Q. 27. What is this figure?

A. $58,016.36. That statement was prepared to be submitted to the creditors at the creditors' meeting.

Q. 28. Statement as of what date?

A. August 21, 1929.

Q. 29. Who had charge of the assets from July 16, 1929 to August 21st of that year?

A. I did, sir.

Q. 30. You as assignee?

A. Yes, sir.

Q. 31. Did you as assignee incur any bills, in the name of Craig, Reed & Emerson, Inc.?

A. Yes, sir.

Q. 32. That is, in the name of the corporation, as assignee you incurred bills?

A. Yes.

Q. 33. Will you tell us whether any items shown in this statement of August 21st, 1929 represents any debts in-
[fol. 27] cured by you as assignee?

A. I think not; in order to do that I would have to get an itemized statement.

Q. 34. Will you tell us what this statement was that you prepared; the statement of August 21, 1929?

A. I don't know.

Q. 35. It was prepared for you?

A. The statement of the condition of Craig, Reed & Emerson was prepared and subjected to the creditors.

Q. 36. Submitted you mean?

A. Yes, sir. Submitted to the creditors at the creditors' meeting.

Q. 37. The statement of the assets and liabilities of Craig, Reed & Emerson?

A. Yes, sir.

Q. 38. You submitted a statement of the liabilities of yourself as assignee?

[Objected to by Mr. Jacobs. Objection sustained.]

Q. 39. Was it submitted as a combined statement of the liabilities of yourself as assignee of Craig, Reed & Emerson, Inc.?

[Objected to by Mr. Jacobs. Objection sustained.]

Q. 40. Arriving at the amount, this $58,016.36, I suppose you don't remember the liabilities of the company?

A. Comes to that—$58,016.36; I would have to see the items.

Q. 41. That represents the liabilities of the assignee as well as the debts of Craig, Reed & Emerson Company?

A. I don't understand the question.

Q. 42. Whether that statement which was prepared under your direction as of August 21st was a statement of the debts which you owed as assignee, as well as the statement of the debts owed by Craig, Reed & Emerson, Inc.?

[Objected to by Mr. Jacobs. Objection sustained.]

Q. 43. Did you submit it to the creditors as a statement of the condition of Craig, Reed & Emerson, Inc.?

A. Yes, sir.

Q. 44. As to the debts of the company owed?

A. Yes, sir.

Q. 45. Your debts were not included, were they?

A. I should say no.

Q. 46. The assets that were turned over to you as assignee were sold, were they not?

A. Yes, sir.

Q. 47. You ran the business for a while?

A. Yes, sir.

[fol. 28] Q. 48. When I say running the business, you simply had the shoes finished, those in process of manufacture?

A. Yes, sir. I found in the books, in the inventory, several hundred pairs of shoes partly finished, so I had them finished and filled the orders. Had to buy some upper leather, small amount, and I was able to complete the shoes.

Q. 49. Those were orders previously received?

A. Shoes were in process of manufacture; yes, sir.

Q. 50. Any other manufacturing done by you as assignee?

A. No, sir.

Q. 51. You just ran out the shoes that were in the works?

A. Yes, sir.

Q. 52. Filled the orders as far as you could?

A. Yes, sir.

Q. 53. What became of the remainder of the assets?

A. The remainder of the assets were sold.

Q. 54. Sold to whom?

A. William A. Hogan.

Q. 55. All sold to one party?

A Yes, sir.

Q. 56. Not sold in lots to different people? Sold to William A. Hogan?

A. Yes, sir.

Q. 57. What did you sell to Mr. Hogan?

A. The assets.

Q. 58. What did the assets consist of?

A. Accounts receivable, inventory, equipment, cash.

Q. 59. Cash was in there?

A. Yes.

Q. 60. Life insurance policies?

A. Yes, sir.

Q. 61. When you speak of the equipment, what do you mean?

A. I mean the plant and machinery.

Q. 62. That was their property?

A. Yes, sir.

Q. 63. You sold the assets of every kind and description whatever in your possession to Mr. Hogan?

A. Yes, sir.

Q. 64. What was the purchase price?

[Objected to by Mr. Jacobs. Objection sustained.]

Q. 65. The assignment was on the 16th?

A. Yes.

Q. 66. Recorded on the 17th?

A. Yes.

Q. 67. The petition was filed on the 26th of September?

Referee Ryan: The 27th of September; the adjudication was some time later; the petition was filed September 27.

[fol. 29] Q. 68. The sale was just a day or two before the petition in bankruptcy was filed; is that correct?

A. I don't know.

Q. 69. Will you tell us when with respect to the filing of the petition in bankruptcy?

Mr. Jacobs. If he knows anything about it.

A. The sale took place on September 27, 1929.

By Referee Ryan:

Q. 70. That was the date of the sale, Mr. Hall?

A. Yes, sir.

Q. 71. When you gave that date you were referring to some paper?

A. Yes, sir.

Q. 72. What is that paper you are referring to?

A. Bill of sale.

Q. 73. May I see it? I am going to offer this bill of sale——

[Objected to by Mr. Jacobs. This paper purports to be signed, executed on the twenty-seventh day of September, 1929, and purports to be a bill of sale of these assets. Insofar as this defendant is concerned, how can it be of ma-

terial on any issue, when the alleged preference is at least two months previous to that date? They could have given away the assets. The assets may have depreciated to nothing. And further than this this was a forced sale, clearly inadmissible.

Objection overruled. Mr. Jacobs excepts.]

["Exhibit 1, Bill of Sale from Assignee Dated September 27, 1929."]

Q. 74. Wasn't the assignment for benefit of creditors made in July?

A. Yes.

Q. 75. Some time before that there was something done to a deposit in the bank; some time after that there was a sale of the assets?

A. Yes.

Q. 76. All the time there was an assignment for benefit of creditors?

A. Yes.

Q. 77. Tell the facts.

A. I don't know.

Q. 78. An application was made, wasn't it?

A. Of course; now I know that an application was made.

Q. 79. After the assignment?

A. I think July 12th.

By Referee Ryan:

Q. 80. This concern was in the hands of its creditors at the time when this offset was made?

[fol. 30] A. The 17th of July; and from that date to the date of the sale it was in the hands of their creditors.

Q. 81. This bill of sale has been in the possession of the Plymouth County Trust Company?

[Objected to by Mr. Jacobs. Objection sustained.]

Q. 82. In whose possession has this bill of sale been in?

[Objected to by Mr. Jacobs. Discussion.]

Q. 83. What was the amount of the purchase price actually received by you, Mr. Hall?

[Objected to by Mr. Jacobs. Objection overruled and exception taken.]

A. $14,330.01.

Q. 84. That was the total purchase price?

A. Yes, sir.

Q. 85. When did you first learn that this assignment was to be made to you?

[Objected to by Mr. Jacobs. Objection overruled.]

A. On the sixteenth day of July, 1929.

Q. 86. How was that knowledge communicated to you, and where were you at the time?

A. I was working at the Plymouth County Trust Company, usual place at my desk, as I remember it.

Q. 87. That is where you were when the information was communicated to you?

A. Yes.

Q. 88. By whom was it communicated?

[Objected to by Mr. Jacobs. Objection overruled.]

A. I don't know who communicated the information to me.

Q. 89. Don't you remember how you got your information?

A. Somebody informed me I was to be appointed assignee.

Q. 90. Don't you know who it was?

A. No, sir.

Q. 91. Under whose direction were you working at that time?

A. Mr. Cooper and Mr. Crocker.

Q. 92. Mr. Cooper is the president—Joseph Cooper?

A. Yes, sir.

Q. 93. Joseph Crocker is the vice-president?

A. Yes, sir.

Q. 94. You were working under their direction?

A. Under their supervision.

Q. 95. Under their supervision or direction?

A. Yes, sir.

Q. 96. At that time was there an assignment presented to you?

[fol. 31] [Objected to by Mr. Jacobs. Objection sustained.]

Q. 97. What time was it, what was done, what was said, if you please?

A. I should say about 3.15 Tuesday afternoon; might have been a little earlier, and might have been a little later; I am not sure of the time. I was informed that I was to be appointed assignee for the benefit of creditors of Craig, Reed & Emerson: assignment was to be made at that time. I met Mr Craig and Mr. Reed in the office of the Plymouth County Trust Company, and papers were drawn up, signed and given to me about 4.30 that afternoon.

Q. 98. Did you say the papers had been drawn up, or were drawn up after Craig and Reed came to the bank?

A. As far as I know, after they got to the bank.

Q. 99. Papers were drawn there at the bank?

A. No, sir.

Q. 100. Where were they drawn, if you know?

A. I believe at Judge Thorndike's office.

Q. 101. Judge Thorndike is counsel for the bank?

A. Yes, sir.

Q. 102. That is, for the Plymouth County Trust Company?

A. He was my counsel.

Q. 103. He was your counsel, too?

A. Yes, sir.

Q. 104. When you were informed that an assignment was to be made, was the instrument before you for your signature?

A. No, sir.

Q. 105. Had it been prepared at the time you were so informed?

A. I don't know.

Q. 106. When did you first see the printed document?

A. I should say about 3.30 that afternoon.

Q. 107. Who showed it to you?

A. Judge Thorndike.

Q. 108. Who was present at the time?

A. No one else; Judge Thorndike and I.

Q. 109. Did you have any talk with Mr. Cooper or Mr. Crocker about the assignment?

A. No, sir.

Q. 110. Never said a word about it, they to you or you to them?

A. I can't answer, my memory doesn't serve me; nothing that I remember.

[fol. 32] Q. 111. Did you ask anyone whether you should take the assignment?

[Objected to by Mr. Jacobs. Objections sustained.]

Q. 112. Did you talk with Mr. Cooper on that day about the assignment?

A. I can't remember that I did.

Q. 113. Will you say whether you did or did not?

A. No, because I can't remember.

Q. 114. You don't know whether you did or did not, and that is right?

A. That is right; yes.

Q. 115. Do you know whether you did or did not talk with Mr. Crocker?

A. I may have talked with either one of them; I can't remember. The first thing I know Judge Thorndike presented the paper to me, which was an agreement.

Q. 116. Did you talk with Craig and Reed that day?

A. Late that afternoon; yes, sir.

Q. 117. You remember that?

A. Yes, sir.

Q. 118. When they were there with you, who was present?

A. Mr. Craig, Mr. Reed, Judge Thorndike and myself.

Q. 119. No one else?

A. No, sir.

Q. 120. What was said by Mr. Craig at that time to you, if you recall?

A. I don't recall, except relative to the signing of the assignment, general talk on the signing of the papers, that is all.

Q. 121. Do you remember what that general talk was?

[Objected to by Mr. Jacobs. Objections overruled.]

Mr. Jacobs: I object to the whole line of questions. Note my exceptions.

Q. 122. Will you give us that general talk?

A. I can't remember; just relative to the signing of the papers, just to signing papers and getting the necessary signatures and put a notary seal on it, that is all I know. All I remember about any conversation.

Q. 123. You are a notary in the bank, I believe?

A. I am a notary.

Q. 124. You didn't take your own acknowledgment that day?

A. No, sir.

Q. 125. What did Mr. Reed say, if you recall? I asked about Mr. Craig, now tell us about Mr. Reed.

[fol. 33] A. I don't remember any conversation other than about signing the assignment with either one of the gentlemen present.

Q. 126. Someone told you an assignment was to be made, an instrument was laid on your desk, you signed it and asked no questions, no discussion among the people?

A. Judge Thorndike presented the papers and I took the responsibility as assignee for the benefit of creditors.

Q. 127. You didn't employ counsel prior to your appointment as assignee?

A. No; I wasn't signing anything unless I had counsel.

Q. 128. Judge Thorndike wasn't acting for you as counsel that minute?

A. He was acting for me at the time I became the assignee.

Q. 129. After you became assignee, he acted as your counsel?

A. I am not signing papers unless the papers are correct, and Judge Thorndike advised me on it.

Q. 130. At that time was Judge Thorndike also the attorney for the bank?

A. I believe so.

Q. 131. Don't you know so?

A. He is one of the attorneys.

Q. 132. He is an attorney employed by the bank?

A. Yes, sir.

Q. 133. He was in charge of the Craig, Reed & Emerson matter for the Plymouth County Trust Company on July 16th, 1929; is that not true?

A. I don't know. You are asking me something I don't know anything about. Prior to the date of the assignment, I know nothing of the procedure.

Q. 134. On July 12th, 1929, did the Plymouth County Trust Company appropriate a deposit of Craig, Reed & Emerson's, to your knowledge?

A. Mr. Jacobs—I haven't any objection to what they did with the checks but I don't think you should say the word "appropriate".

Q. 135. What, if anything, did the Plymouth County Trust Company do on or about January, 1929, I mean July 12, 1929, with respect to any deposit of Craig, Reed & Emerson's?

A. Set it off on a demand loan.

Q. 136. And you know that was on July 12th?

A. Yes, sir.

Q. 137. What happened the next day, July 13th, with [fol. 34] respect to any deposit Craig, Reed & Emerson might then have had?

A. The amount was set off against the loan.

Q. 138. How much was set off on July 12th?

A. $4,027.29.

Q. 139. How much was set off on July 13th?

A. $15,100.78.

Q. 140. Thirteenth was a Saturday; what happened on July 15. I mentioned that 13th was Saturday, the 15th was the following Monday. Was there any set off on Monday, the 15th?

A. $1,000.96.

Q. 141. Was that one or two deposits? Was the sum of $1,000.96 composed of one or two deposits?

A. I can't answer that question.

Q. 142. You don't know that?

A. No, sir.

Q. 143. Do you know that on the 13th an appropriation was made of fifteen odd thousand dollars?

A. Yes, sir.

Q. 144. How do you know it?

A. I probably saw the entry go through. Might have put it through myself.

Q. 145. Did you put it through?

A. I will have to check the records. I handled the notes; it might have been myself or the other gentlemen in the cage.

Q. 146. Acting on your own initiative or acting under the supervision of Mr. Cooper or Mr. Crocker?

A. I was working under their supervision.

Q. 147. Under whose supervision? Under the supervision of one or both of them?

A. I don't know which one told me.

Q. 148. Don't you know which one told you?

A. I don't know which one told me, if I did put the entry through.

Q. 149. You really are stretching your memory to give us the exact story?

A. Yes, sir; absolutely.

Q. 150. You don't know if Mr. Cooper or Mr. Crocker told you to set off this sum of money on July 13th?

A. No.

Q. 151. Did they tell you how much to set off?

A. You are asking me a question I know nothing about. I am not sure I made the entry.

Q. 152. What did you have to do with the transaction that day?

A. I saw the entry go through. I may have been the one to put it through.

[fol. 35] Q. 153. Besides observing the entry go through, what did you do with the deposit of $15,100?

A. I had nothing to do with the deposit.

Q. 154. Was it one check or many checks?

A. It was four checks, I should say.

Q. 155. The $15,000 offset was on the 13th?

A. Set off on the 13th.

Q. 156. The deposit was made on July 11th, was it not?

A. Yes, sir.

Q. 157. Or was it the 10th; the 10th or 11th?

A. The 11th.

Q. 158. Was the $15,100.78 one deposit?

A. One deposit; yes.

By Referee Ryan:

Q. 159. Made on July 11th?

A. Yes.

Q. 160. When was that deposit entered in your books?

A. July 13th.

Q. 161. Why was it not entered in the books before July 13th?

A. Well, these checks were forwarded to New York for collection.

Q. 162. Did you do the forwarding?

A. According to the records I did. At the last testimony I didn't remember it. I signed the letter at least.

Q. 163. You dictated the letter, didn't you?

A. According to the records; yes.

Q. 164. So you have studied the transcript of the evidence? You have studied the trauscript of the testimony?

A. Well, the correspondence shows that.

Q. 165. These four checks were checks of G. R. Kinney Company, were they not?

A. Yes, sir.

Q. 166. And they were forwarded by you, acting for the Plymouth County Trust Company, to a New York bank to collect; that is true, is it not?

A. Yes, sir.

Q. 167. That was the only time Craig, Reed & Emerson checks were handled by you in that way?

[Objected to by Mr. Jacobs.]

A. As far as I know.

Q. 168. You never heard of any checks of Craig, Reed & Emerson handled that way before by your bank?

[Objected to by Mr. Jacobs. Objection overruled.]

[fol. 36] A. Possibly a large check deposited at the bank, so we could get the credit as quickly as possible.

Q. 169. Did you hear Mr. Crocker testify at the last hearing, at the trustee's hearing, the trustee's examination? Did you hear Mr. Crocker's testimony?

A. No; I didn't know there was a trustee's hearing.

Q. 170. You know there was a trustee's examination over in the bank?

A. Yes, sir.

Q. 171. The record you spoke of a moment ago was a transcript of the evidence at the hearing; did you hear Mr. Crocker's testimony?

A. No, sir, I did not.

Q. 172. What was your reason for sending these checks to New York instead of putting them through in the regular course; instead of putting them through in the usual channel?

[Objected to by Mr. Jacobs. Question stricken out by order of Mr. Cook.]

Q. 173. What is your usual channel for collection of checks drawn on out of state banks; out of state banks?

A. Forward them under a transit letter.

Q. 174. To whom?

A. To our correspondent, to a clearing house.

Q. 175. Do your checks go through a clearing house?

A. They go to our correspondent who puts them through the clearing house.

Q. 176. Are your checks accompanied by letters?

A. Transit letters.

Q. 177. Just transit letters?

A. Yes, sir.

Q. 178. Is a transit letter such a letter as accompanied these particular checks?

A. No, sir.

Q. 179. This was a special letter?

A. Yes, sir.

Q. 180. Have you that letter?

A. Letter of July 12th; yes, sir.

Q. 181. This is a copy of the letter of July 12th, 1929, written by you to the National City Bank of New York, written by you as an officer of the Plymouth County Trust Company?

A. Yes, sir.

Mr. Cook: I shall offer this letter as "Exhibit 2".

[Exhibit 2, letter from Plymouth County Trust Company to National City Bank of New York, dated July 12th, 1929.]

[fol. 37] Mr. Cook: I will read the letter of July 12th, 1929.

National City Bank, New York, N. Y.

GENTLEMEN: We enclose herewith checks amounting to $15,100.78 drawn by the G. R. Kinney Co. Inc.

Will you kindly collect the same placing credit to our account and advising us immediately by wire.

Very truly yours, —— ——, Asst. Treas.

LHH/M.

Q. 182. Why did you ask the National City Bank to advise you immediately by wire concerning these checks?

A. We wanted to know if they were good.

Q. 183. What was the urgency, if there was one?

A. Why, if the day before we set off a balance our intention was to take that balance.

Q. 184. So that at the time this letter was written on the 12th you intended to set off this balance of $15,000 on account of your demand note?

A. Yes, sir.

Q. 185. And was that a decision you reached or something told you by Mr. Cooper or Mr. Crocker?

A. Not my decision. I was acting under the direction of the other officers.

Q. 186. When you say the other officers, you mean Mr. Cooper or Mr. Crocker?

A. Yes.

Q. 187. Are they the only officers of your bank?

A. Only active ones.

Q. 188. Had you notified Craig, Reed & Emerson at that time that you had set off the $4,000?

A. No, sir.

Q. 189. Did you notify them on Saturday of your intention to set off that $15,00?

A. No, sir.

Q. 190. Did you notify them on Friday, when you got the $15,000, of your intention to set off that sum of money?

A. No, sir.

Q. 191. Why was that letter of yours not sent on Thursday, the 11th, when you got the money, instead of Friday, the 12th; this letter here, Exhibit 2? Why did you delay a day in sending the checks to New York?

A. The checks were deposited in our branch office. The [fol. 38] office is opened until 5.30 Friday night, cleared our main office the next day.

Q. 192. If you got them early enough on the 11th, you would have done the same thing with them; that is right?

A. Yes, sir.

Q. 193. Do you know why Craig, Reed & Emerson were not notified on Friday or Saturday of your intention to set off the balance?

A. No, sir.

Q. 194. Were they notified on Monday, if they were notified?

A. Yes. I don't know the exact date when they were notified.

Q. 195. Did you at any time notify them?

A. No, sir.

Q. 196. Following that letter, did you send any further

communication to the National City Bank; following that letter to the National City Bank, did you send them any further communication pertaining to the Craig, Reed & Emerson checks?

A. No, sir.

Q. 197. When you say you didn't, you mean you personally didn't; you are not saying the bank didn't have some further communication with the National City Bank?

A. No, sir.

Q. 198. As a matter of fact, you know Mr. Crocker had communicated with the National City Bank?

A. Yes, sir.

Q. 199. Was there a telegram sent on Saturday, the 12th, to the National City Bank?

A. No, sir.

Q. 200. On the 13th?

A. There was.

Q. 201. Have you a copy of that telegram? Did you send the telegram?

A. No, sir.

Q. 202. Do you know who did?

A. I do now.

Q. 203. Where did this come from?

A. Out of our letter files.

Mr. Cook: I shall offer this as an exhibit.

[Objected to by Mr. Jacobs. Objections sustained.]

Q. 204. Have you your file of correspondence, the bank's file of correspondence, pertaining to the Craig, Reed & Emerson transaction before you?

A. I have part of it.

Q. 205. Have you a copy of a letter which Mr. Crocker sent to the National City Bank on July 13th, 1929, there? I have one signed by Joseph C. Crocker, Jr.; is this the letter?

A. Yes, sir.

Q. 206. This comes out of your letter files pertaining to this transaction?

A. Yes, sir.

[fol. 39] [Letter offered as an exhibit, "Exhibit 3—Letter dated July 13th to the National City Bank".]

Mr. Cook: I shall read the letter bearing date of July 13th, 1929, addressed to the:

National City Bank, 55 Wall Street, New York, N. Y.

GENTLEMEN: We call your attention to the following transaction:

Under date of July 12th, we sent you by early mail three checks amounting to $15,100.78, drawn by the G. R. Kinney Co., Inc. These checks were sent direct by special delivery. We asked you to wire immediately payment. We wired you again today at eleven o'clock relative to the payment of the same, and up to the writing of this letter, twelve-thirty, have not received any answer.

We cannot understand the delay and we would thank you to give us some explanation relative to the same.

Very truly yours, Joseph C. Crocker, Jr., Vice-President.

JCC/D.

Q. 207. Any doubt in your mind, Mr. Hall, that the telegram referred to in Mr. Crocker's letter was sent?

A. No, sir.

Mr. Cook: I offer the telegram as an exhibit.

["Exhibit 4"—Telegram to the National City Bank.]

I will read the telegram:

National City Bank, 55 Wall Street, New York, N. Y.:

Please advise fate G. R. Kinney Co. checks fifteen thousand odd received by you this day.

Paid.

Plymouth County Trust Company.

Q. 208. You told us on Monday, the 15th, there was $1,000 set off?

A. Yes, sir.

Q. 209. What did that $1,000 consist of, checks or cash deposit?

A. Checks.

Q. 210. Have you the slip showing the banks on which these checks were drawn?

A. No, sir.

[fol. 40] Q. 211. Have you a copy of the deposit slip for that date?

A. Yes, sir.

Q. 212. Does not that deposit slip show the bank upon which the several checks were drawn?

A. Yes, sir.

Q. 213. Why did you say "no"?

A. The $1,000 deposit.

By Referee Ryan:

Q. 214. He asked you about the $1,000 deposit, whether it was checks or cash and you said checks. Then he asked you "Can you tell us on what banks these checks were drawn?" and your answer was "No". The question was very plain.

A. There is a point; I still maintain I am right in my answer.

Q. 215. You have before you a record of the banks on which these checks were drawn?

A. Yes, sir.

Q. 216. You can't tell us the banks on which these checks were drawn?

A. Not the banks, the cities.

Q. 217. Were any of these checks sent out by special delivery letter or otherwise, in the same fashion as that on the 15th?

A. Not that I know of.

Q. 218. What did the $4,000 offset consist of?

A. I should say checks.

Q. 219. The set off of $4,000, was that one deposit or a balance?

A. Collected item.

Q. 220. Collected item? You mean by that checks collected or draft collected?

A. Checks collected.

Q. 221. Checks were collected before you appropriated?

A. Yes, sir.

Q. 222. Had they been collected at the time of your appropriation?

A. As far as I know, yes, sir.

Q. 223. Will you look at your records and tell us about the appropriation on the 12th?

A. I would have to go back on the deposit slip.

Q. 224. Here is one on the 10th.

A. It is prior to that.

Q. 225. Do you know whether they were collected funds or not?

A. I assume they were.

Q. 226. Was there a deposit made on the 12th?

A. No.

Q. 227. There was no deposit made on the 12th?

A. No.

[fol. 41] Q. 228. There was some money in your bank on the 12th?

A. Yes, sir.

Q. 229. How much was in your bank in the form of collected funds on July 12th?

A. $4,027.29.

Q. 230. How much was in your bank in the form of uncollected funds on that day?

A. I can't answer that.

Q. 231. Was there anything there?

A. There was a balance.

Q. 232. How much?

A. $843.58.

Q. 233. Why was that balance left, Why didn't you take that?

A. Under advice of counsel.

Q. 234. Did you discuss it with counsel?

A. No, sir.

Q. 235. It was under advice of counsel?

A. Yes, sir.

Q. 236. That the whole balance was not appropriated, you personally do not know why it was not taken; that is right?

A. Yes, sir.

Q. 237. When did your bank first consult counsel about this Craig, Reed & Emerson matter?

A. I don't know.

Q. 238. You haven't any knowledge?

A. No, sir.

Q. 239. Was that letter of July 12th, the sending of these checks by special delivery, also on advice of counsel?

A. I don't know.

Q. 240. When you wrote the letter, under whose direction were you acting?

A. I acted under the direction of Mr. Crocker or Mr. Cooper.

Q. 241. You don't know if what they directed you to do was under the advice of counsel?

A. No, sir.

Q. 242. Was there a balance left in the bank on July 13th, after your appropriation?

A. Yes, sir.

Q. 243. What did that balance amount to?

A. $790.44.

Q. 244. Then you had paid out a part of the balance of the day before?

A. Yes, sir.

Q. 245. The following Monday did you appropriate the balance?

A. Yes, sir.

Q. 246. What was that balance?

A. $1,348.72.

Q. 247. And you appropriated all that balance?

A. Yes, sir.

Q. 248. There had been a deposit made to swell that balance?

[Objected to by Mr. Jacobs. Objection overruled.]

[fol. 42] A. Deposit made on the 15th.

Q. 249. And what was the amount on that day?

A. $347.76 and $316.56.

Q. 250. These were the checks which were not collected; all appropriated by the bank?

A. Yes, sir.

Q. 251. In the course of your duties at the bank, did you act as notary?

A. Yes, sir.

Q. 252. And did you protest dishonored papers?

A. Yes, sir.

Q. 253. Did you have charge of protesting dishonored papers?

A. Yes, sir.

Q. 254. When did you first protest any Craig, Reed & Emerson papers?

[Objected to by Mr. Jacobs. Objection overruled.]

A. I haven't got the dates here. Haven't got my book with me.

Q. 255. Do you remember ever having protested any before July 10th, 1929?

A. No, sir.

Q. 256. Will you say you never protested any of their papers before that date?

A. No, sir.

Q. 257. You won't say that?

A. No, sir.

Q. 258. As far as you recall, you never protested any paper before that date?

A. No, sir.

Q. 259. After July 10th did you protest any of their checks?

A. Yes, sir.

Q. 260. Have you got a list of the checks you protested?

A. Yes, sir.

Q. 261. Have you that list with you?

A. No, sir.

Q. 262. Where is it?

A. At the bank.

Q. 263. You were asked to bring your records.

A. I thought I had all of them with me but I find I haven't.

Mr. Jacobs: We will agree that it is the same as at the trustee's hearing.

Q. 264. Will you have that record here this afternoon, please?

A. Yes, sir.

Q. 265. There was a time when your bank held up payment of checks of Craig, Reed & Emerson, wasn't there?

A. Yes, sir.

Q. 266. Was that just prior to July 13th?

A. Yes, sir.

[fol. 43] Q. 267. And were all checks held up?

A. No, sir.

Q. 268. What checks went through?

A. Pay roll checks.

Q. 269. Any other checks?

A. Not that I know of.

Q. 270. Wasn't there one other; a rent check?

A. That wasn't a check, sir.

Q. 271. The rent was not a check?

A. No, sir. That was paid out of the appropriation; it was a charge.

Q. 272. That was a charge?

A. Yes, sir.

Q. 273. The Plymouth County Trust Company was landlord of Craig, Reed & Emerson?

A. Yes, sir.

Q. 274. You charged the rent up against the account?

A. Yes, sir.

Q. 275. The only checks that went through were pay roll checks?

A. Yes, sir, as far as I know.

Q. 276. What date was it that directions were given to stop payment on checks?

A. I don't know the exact date.

Q. 277. Do you know how long prior; how many days prior to July 13th it was?

A. No; I don't know the exact date.

Q. 278. Do you recall the notation accompanying the first checks that were returned?

A. I think I do; uncollected funds.

Q. 279. The amount on deposit was not sufficient to cover these checks; is that right?

A. I would have to refer to the records.

Q. 280. You have your notary record with you now, Mr. Hall?

A. Yes, sir.

Q. 281. Will you turn to that record and tell us what you protested on July 13th, 1929? How many checks were protested that day?

A. Two.

Q. 282. The amounts?

A. $300 and $1,397.97.

Q. 283. These were two checks?

A. Yes, sir.

Q. 284. What notation accompanied these checks?

A. Uncollected funds.

Q. 285. Was that true?

[Objected to by Mr. Jacobs. Objection overruled and exceptions saved.]

A. I would say the record was true.

Q. 286. You say that is true?

A. I should say it is true.

[fol. 44] Q. 287. And do you say that after checking your records, Mr. Witness?

A. Yes, sir.

Q. 288. Then when next did you return checks?

A. On the 15th.

Q. 289. That was Monday?

A. Yes, sir.

Q. 290. How many that day?

A. Three.

Q. 291. What did they amount to?

A. Total amount or individual items?

Q. 292. Give us the total, if you please.

A. $827.92.

Q. 293. Were there any funds in the bank there that day?

A. Yes, sir.

Q. 294. And more than $827.92?

A. Yes, sir.

Q. 295. What became of these funds?

A. Set off against the loan.

Q. 296. That is, your bank took that money and returned these checks?

A. Yes, sir.

Q. 297. Were there any checks returned after that?

A. Yes, sir.

Q. 298. The account was closed on the 15th, was it not?

A. Yes, sir.

Q. 299. All checks which came in after the 15th were returned?

A. Yes, sir.

Q. 300. When the rent was appropriated by the bank, did that pay the rent up to date?

A. That paid the rent to July 1st.

Q. 301. So far as you know the bank has been paid the rent due it by Craig, Reed & Emerson?

A. It has not.

Q. 302. It has not?

A. No, sir.

Q. 303. From what date?

A. From July 1st to July 16th; to the date of the assignment.

Q. 304. So when you testified the rent had been paid for the full period you were in error?

A. I must have been; yes, sir.

Cross-examination.

By Mr. Jacobs:

X Q. 305. Mr. Hall, during the course of the examination, Mr. Cook asked you whether you could tell from the deposit slip the name of the banks on which the checks were drawn, and you answered "No", then the court said that was a question you should have answered correctly. Was your answer "No" correct? That is, you can't tell from the deposit slip the name of the bank, could you?

A. No, sir.

[fol. 45] X Q. 306. You could tell the name of the cities?

A. Yes, sir.

X Q. 307. But the question was the name of the banks?

A. Yes, sir.

X Q. 308. Have you the deposit slip there showing the deposit of checks that were set off by the bank on the 13th day of July?

A. Yes, sir.

X Q. 309. May I see it? Then the deposit was made on July 11th, 1929; is that right?

A. Yes, sir.

X Q. 310. And the checks were on New York City banks?

A. Yes, sir.

X Q. 311. And amounted to $15,100.78?

A. Yes, sir.

X Q. 312. And this is one of the records of the bank, this deposit slip?

A. Yes, sir.

Mr. Jacobs: I offer it as an exhibit.

["Exhibit 5"—deposit slip dated July 11th, 1929.]

X Q. 313. That deposit was made at the Campello branch?

A. Yes, sir.

X Q. 314. And didn't arrive—the checks didn't arrive to your main office until when?

A. The following day, the 12th.

X Q. 315. When you made this set-off on the eleventh day of July, on the twelfth day of July you intended to set off all of the funds, the credits and checks, whether collected or uncollected that the bank had in its possession on that day, did you not?

A. Yes, sir.

X Q. 316. The books are kept at your main office?

A. Yes, sir.

X Q. 317. And the main office showed a balance of four thousand odd dollars on the 12th, that amount was set off?

A. $4,027.29 set off.

X Q. 318. And when the checks of $15,000 were delivered on the following day to the main office, you then made the proper bookkeeping entries showing the set-off of the $15,000? Is that right?

A. Yes, sir.

X Q. 319. Then the checks were sent to New York for collection, weren't they?

A. No, sir.

X Q. 320. When were the checks sent to New York for col-
[fol. 46] lection?

A. The checks were deposited in the branch office on the 11th and sent to New York on the 12th.

X Q. 321. Checks sent to the main office who sent them to New York?

A. No, sir.

X Q. 322. Weren't the checks sent to New York on the 12th?

A. Yes, sir.

X Q. 323. That is what I asked you. Is the National City Bank your correspondent?

A. Yes, sir.

X Q. 324. And it is the bank to which you would ordinarily send New York checks for collection?

A. Yes, sir.

X Q. 325. Was this matter handled in any different manner, except that you asked them to wire when the checks were collected?

A. The only difference is that a transit letter usually accompanied it.

X Q. 326. What is a transit letter?

A. Just a letter or memorandum showing the items.

X Q. 327. How does one read?

A. Gives the name on one side and the institution, and on the other side the amounts.

X Q. 328. In this case you sent this letter with the checks asking them to wire that the checks were collected?

A. Yes.

By Referee Ryan:

X Q. 329. Ordinarily a transit letter is sent?

A. Yes, sir.

X Q. 330. There was something said about your taking all over eight hundred some odd dollars; is that right?

A. Yes.

X Q. 331. On what day?

A. Close of business on the 12th.

X Q. 332. What was the amount?

A. $843.58.

X Q. 333. Why didn't you take that too, do you remember?

A. I can't remember the details.

X Q. 334. Was there something said about payroll checks?

A. Counsel advised us to accept payroll checks as presented because they were preferred claims.

X Q. 335. Did you have any talk with counsel?

A. No, sir.

X Q. 336. All you know of it is that your instruction was to pay the payroll checks?

A. You are asking me a question I personally do not know anything about.

[fol. 47] X Q. 337. You don't know about it?

A. I know it from hearing it.

X Q. 338. Were you informed to take an amount, leaving another amount to take care of pay roll checks? Were you informed by anyone to leave a sufficient amount?

A. I believe I was.

X Q. 339. Do you remember who informed you?

A. No.

X Q. 340. In making the set-off, you left a sum sufficient to take care of pay roll checks?

A. I didn't do it.

X Q. 341. Did you make the set-off?

A. I believe I made some of the set-offs, I am not sure of the $15,000.

X Q. 342. Did somebody tell you to leave an eight hundred odd dollar balance on Saturday?

A. The amount was told to me.

X Q. 343. You did the bookkeeping?

A. I did the detail work on the operation of the set-off.

X Q. 344. In regard to the notice to Craig, Reed & Emerson of this city, do you know anything about it; whether notice was given or not?

A. No, sir.

X Q. 345. Personally you do not know?

A. No, sir.

X Q. 346. You say there was a charge made of three hundred odd dollars for rent?

A. Yes, sir.

X Q. 347. Has that been done before on the payment of rent in the bank's dealing with Craig, Reed & Emerson?

A. Yes, sir.

X Q. 348. That was the ordinary way the rent was paid, by charge?

A. Yes, sir.

Redirect examination.

By Mr. Cook:

Q. 349. In answer to Mr. Jacobs' question, you stated that the appropriation of deposits was the customary way of collecting the rent. Was it the customary way on that account?

A. Yes.

Q. 350. That is, they didn't draw checks to the bank's order?

A. Yes.

Q. 351. That is up to July 1st, they always drew checks covering their rent?

A. Yes, sir.

Q. 352. In July no check was drawn, just a charge against the account?

A. The facts are like this: The rent became due and [fol. 48] interest on the demand loan monthly; rents are payable monthly.. Usual notice was sent out for the interest

on the demand note. That would be paid anywhere from the 12th to the 15th or the 18th. I would put a charge ticket through; I would get a check and then I'd swop it over. That had been a custom for several months, quite a period, to put through a charge ticket for the rent and interest.

Q. 353. A check wasn't drawn in this transaction?

A. Not this transaction.

Q. 354. You knew the account was being closed out?

[Objected to by Mr. Jacobs. Objection sustained.]

Q. 355. Who prepares your transit letters?

A. Check tellers' department.

Q. 356. Any of the officers of the bank have anything to do with that?

A. No, sir.

Q. 357. Written matter handled by the clerks of the bank?

A. Yes, sir.

Q. 358. That applies to the transit letters?

A. Yes, sir.

Recross-examination.

By Mr. Jacobs:

X Q. 359. Now about the sum of money being left to cover pay roll checks, will you tell us just why it was that you appropriated four thousand odd dollars and odd cents instead of an even sum of money?

A. Because I was told to do it.

X Q. 360. Do you recall who told you?

A. No, sir.

X Q. 361. Do you know how the sum of four thousand odd dollars was arrived at?

A. No, sir.

ALVAN T. REED (sworn).

Direct examination.

By Mr. Cook:

Q. 1. What is your name?

A. Alvan T. Reed.

Q. 2. Where do you reside, Mr. Reed?
A. South Weymouth.
Q. 3. Street address?
A. 59 Torrey Street.
Q. 4. Are you an officer—were you an officer of Craig, Reed & Emerson, Inc.?
A. I was.
Q. 5. What office?
A. Vice-president at that time.
[fol. 49] Q. 6. At that time, you are referring to July 13th, 1929?
A. I am.
Q. 7. Are you today a member of a similar business?
A. Yes, sir.
Q. 8. What is the name?
A. Craig, Reed Shoe Company.
Q. 9. You are located in the same quarters?
A. Same building.
Q. 10. Same machinery?
A. Practically.
Q. 11. Same plant?
A. Yes, sir.
Q. 12. In the same location?
A. Yes, sir.
Q. 13. Mr. Jacobs says making the same kind of shoes and your answer is "Yes"?
A. Yes.
Q. 14. On the same lasts?
A. Yes, sir.
Q. 15. Was your company indebted to the Plymouth County Trust Company in July of 1929?
A. They were.
Q. 16. How long had they been indebted to the bank?
A. Neighborhood of nine or ten years.
Q. 17. That is the loan had been made nine or ten years ago?
A. Well, they loaned and it was paid off and reloaned; new loan was taken up.
Q. 18. What were these notes paid out of?
A. Our own funds.
Q. 19. What was the greatest sum owing to the bank at any one time, to your knowledge?
A. I think the greatest sum was $36,500.

Q. 20. Was there a demand note held by the bank?

A. That was a demand note.

Q. 21. Do you know when that note was dated?

A. I don't know.

Q. 22. How long had it been outstanding?

A. I can't answer that question.

Q. 23. My attention has been called by Mr. Hall of the bank to this item—March 8, 1927, $36,500, demand note. That does not refresh your memory?

A. No.

Q. 24. Do you know whether the note had been outstanding for a year or more?

A. I can't answer that.

Q. 25. Did you have charge of the financing of the company?

A. I did not.

[fol. 50] Q. 26. Who had charge of this?

A. Mr. Craig.

Q. 27. What were your duties?

A. The manufacturing of the shoes; the outside.

Q. 28. Any other duties?

A. Buying, hiring of the help, looking out for the shoes, the manufacturing of the shoes.

Q. 29. In June of 1929, was there a conference between your concern and Mr. Cooper pertaining to your loan?

A. Yes, sir.

Q. 30. Where did that conference take place?

A. Office of the Plymouth Development Company.

Q. 31. Is that the Edgar B. Davis office?

A. Yes, sir.

Q. 32. Mr. Davis a stockholder in your company?

A. Yes, sir.

Q. 33. Preferred stockholder?

A. Yes, sir.

Q. 34. He is interested in your present company?

A. Financially interested.

Q. 35. The office of the Plymouth County Development Company is Mr. Davis' headquarters?

A. Yes, sir.

Q. 36. Who was present at that conference?

A. Mr. Craig, Mr. Field, Mr. White, Mr. Hogan, Mr. Davis, Mr. Keay, Mr. Mackin.

Q. 37. Who are all these gentlemen you are naming?

A. Mr. Cooper and the stenographer. I have forgotten her name.

Q. 38. What was the purpose of the meeting?

A. Purpose was to see whether the bank would go along with Craig, Reed & Emerson any further financially; to see if we had business enough to warrant continuing and what our prospects were. We outlined the program as to the selling; how many shoes we thought we could sell in the next three months and the consensus of opinion was to go ahead and sell all the shoes we could in the next three months; and we would not be disturbed.

Mr. Jaccbs: I object to all this.

Q. 39. Mr. Cooper of the Plymouth County Trust Company was present at that meeting?

A. He was.

Q. 40. Tell us as nearly as you can what was said at the meeting, Mr. Reed.

A. Why, they asked us where we would sell the shoes.

Q. 41. Who asked that of whom?

A. Mr. Hogan I think was one.

[fol. 51] Q. 42. Who is Mr. Hogan?

A. He was a shoe factory advisor; knows quite a lot about shoes.

Q. 43. Who asked him to the meeting?

A. I know we didn't.

Q. 44. Do you know who asked him?

A. No, sir.

Q. 45. He was present and participated in the meeting?

A. Yes, sir.

Q. 46. Mr. Cooper was present during the time this conference took place?

A. Yes, sir.

Q. 47. What else was said?

A. They asked us how many shoes we could sell in the next three months and we told them the people we thought we could sell them to. Outlined what could be sold would pay our running expenses and show us a little margin of profit; and they said: "Go out and sell as many shoes as you can in the next three months; do what you can. Get as many more of the payers as you can." That was the gist of the conversation.

Q. 48. Was anything said about the period of time?

A. Three months; in three months we could sell so many thousand pairs of shoes.

Q. 49. What did Mr. Cooper say at that time?

A. I don't think he said anything personally in open meeting.

Q. 50. Did he participate in the meeting?

A. Yes, sir.

Q. 51. He talked?

A. He talked not in an open talk. He talked with people in the meeting, not openly.

Q. 52. Did Mr. Davis have any conversation with Mr. Cooper?

A. Yes.

Q. 53. Did you hear him?

A. I did not.

Q. 54. You didn't hear any conversation between them?

A. No.

Q. 55. Did you hear Mr. Davis say "Well, Joe, what do you say; shall we let them go out and do it?" and Mr. Cooper said "I think so" or something to that effect. Those probably were not the exact words. Did you hear something of that sort Mr. Cooper said: "Go out and sell all the shoes you can; go to it."

A. I don't know.

Q. 56. Did you have any further meetings with Mr. Cooper or any officers of the bank after that?

A. No, sir.

[fol. 52] Q. 57. When did you first know that the bank had called the loan? On the morning of Monday, July 15th?

A. Yes, sir.

Q. 58. How were you made acquainted with that fact?

A. I was called on the telephone.

Q. 59. By whom?

A. Mr. Crocker of the bank.

Q. 60. Did you talk with Mr. Crocker yourself?

A. Yes, sir.

Q. 61. What did he say to you?

A. He said that they had called our loan and for me to come down to the bank and talk things over.

Q. 62. What else was said?

A. I told him I would come down to the bank but I would not sign any papers. Mr. Craig was away, down to New Haven, and would probably be back tomorrow morning.

Then I would go down. In the meantime, I went to the bank on Monday and saw Mr. Crocker; told him the situation.

Q. 63. Mr. Crocker tell you he had any papers he wanted you to sign?

A. He told me over the phone.

Q. 64. That is, on Monday morning, when he talked with you, he said he had the papers for you to sign; and your answer was that you would go to see him but would not sign any papers until Mr. Craig returned?

A. Yes, sir.

Q. 65. You went to see Mr. Crocker at the bank?

A. Yes, sir.

Q. 66. What did Mr. Crocker say?

A. He said that they decided to call our loan; wasn't going along with us any further.

Q. 67. What else was said, if anything?

A. I don't remember.

Q. 68. Conversation begin and end there?

A. Apparently nothing for us to do. I said I wouldn't sign any papers until tomorrow; and when Mr. Craig returned we would get in touch with him as soon as we could.

Q. 69. Did he show you any papers to sign?

A. No, sir.

Q. 70. Did he ask you to sign any papers that day?

A. On the telephone.

Q. 71. Not while you were present at the bank?

A. No, sir.

Q. 72. How long were you with Mr. Crocker at that time?

A. Probably fifteen or twenty minutes.

[fol. 53] Q. 73. Prior to that had any demands been made for payment of the loan?

A. Not that I know of.

Q. 74. Had the payment of the loan been discussed with you?

A. No, sir.

Q. 75. Was the payment of the loan discussed at the meeting held in June at the Plymouth County Development Company?

A. No.

Q. 76. At the time of the assignment and after the appropriation by the bank, was there a balance due and owing to the bank?

A. I can't answer that question. I don't know. I was not on the financial end of it. I don't know.

Q. 77. Do you know if there was a balance due and owing to the bank, any balance at all?

A. I can't answer that question.

Q. 78. Is it because you don't know, Mr. Reed?

A. I don't know.

Q. 79. Has there been any arrangements made, either direct or indirect, for the payment by your present company to the Plymouth County Trust Company of any money on the amount due before the date of the assignment?

[Objected to by Mr. Jacobs. Question excluded.]

Q. 80. Your present company bought the assets of the assignee of Craig, Reed & Emerson at a sale?

A. Yes, sir.

Q. 81. That purchase was arranged through Mr. Davis?

A. Yes.

Q. 82. Mr. Hogan was the party?

A. Yes, sir.

Q. 83. Whose money was used, if you know?

[Objection by Mr. Jacobs. Objection overruled and exception taken.]

Q. 84. So far as you know?

A. As far as I know the Plymouth County Development Company.

Q. 85. The Plymouth County Development Company is whom, if you know?

A. I don't know.

Q. 86. You don't know who it is?

A. No.

Q. 87. Has Edgar B. Davis any connection with it?

[Objected to by Mr. Jacobs.]

Q. 88. Do you know whether he has any connection with it?

[Objected to by Mr. Jacobs. Objection overruled.]

[Vol. 54] A. I don't know.

Q. 89. Who is Mr. White?

A. Mr. Davis' private secretary.

Q. 90. Who arranged for the purchase of the plant from the assignee?

A. I think it was through Mr. White.

Q. 91. Mr. White bring the money in?

A. I can't answer that question.

Q. 92. You don't know?

A. No.

Q. 93. All the negotiations for the purchase were through Mr. White, Mr. Davis' secretary?

A. I think so.

Q. 94. Mr. Davis is financially interested in your present company?

[Objected to by Mr. Jacobs. Objection overruled.]

A. Yes, sir.

Q. 95. Have you had any discussion with anyone about any balance due by Craig, Reed & Emerson, Inc. in bankruptcy to the Plymouth County Trust Company? Had any talk with anyone concerning the balance by Craig, Reed & Emerson, the bankrupt company?

A. No, sir.

Q. 96. You have not?

A. Not that I know of.

Q. 97. If you had talked with anyone, you would know it?

A. Yes, sir.

Q. 98. Do you know who Mr. Field is?

A. Yes.

Q. 99. He was present at the June conference in the Davis office?

A. Yes, sir.

Q. 100. Did Mr. Field participate in that meeting?

A. Yes, sir.

Q. 101. What did Mr. Field say and whom did he address?

A. He told about the number of shoes he thought he could sell in the next three months. He was a salesman. He was selling shoes to the meeting.

Q. 102. Have you been examined by the trustee in bankruptcy? Has he asked questions of you?

A. No, sir.

Q. 103. I mean Mr. MacDonald; he is the trustee in bankruptcy?

A. Yes, sir.

Q. 104. Has he examined you and asked questions?

A. Yes, sir.

Q. 105. You have given him answers?

A. Yes.

Q. 106. And correct answers?

A. As near as I could.

[fol. 55] Q. 107. Were these answers sworn to?

A. Not that I know of.

Q. 108. I show you this testimony; will you read that?

A. "Was Mr. Cooper there?" "Yes."

Q. 109. Do you remember that answer?

A. Yes.

Q. 110. "Was he so he could hear?" Answer, "Yes." Do you remember that?

A. Yes.

Q. 111. "What else was said?" Answer——

[Objected to by Mr. Jacobs.]

Q. 112. Do you remember this answer by you?

[Objected to by Mr. Jacobs.]

Q. 113. Did you give this answer in response to a question by Mr. MacDonald?

[Objected to by Mr. Jacobs.]

Q. 114. Did Mr. MacDonald ask you what Mr. Davis had to say?

[Objected to by Mr. Jacobs. Objection sustained.]

Q. 115. What did Mr. Davis say?

A. If I remember correctly I think he said, "What do you say, Joe? I think we ought to let them go out and sell all the shoes that they can."

Q. 116. Do you recall what Mr. Cooper said in reply?

A. I don't know the exact words.

Q. 117. Will you tell us in substance, if you can't recall the exact words?

A. "I think we should go along with them a little further."

Q. 118. That is what Mr. Cooper said?

A. Yes, sir.

Q. 119. Did you have anything to do with the books and records of your company? Do you know about the assets and liabilities?

A. No, sir.

Q. 120. Did anyone ask at the meeting in June what the object of that meeting was? At the conference did anyone ask what the object of the meeting was?

A. I don't remember.

[No cross examination by Mr. Jacobs.]

[fol. 56] ANSEL W. CRAIG (sworn).

Direct examination.

By Mr. Cook:

Q. 1. What is your full name?

A. Ansel W. Craig.

Q. 2. What is your first name? Spell it.

A. A-n-s-e-l.

Q. 3. Where do you reside?

A. Abington.

Q. 4. Street address?

A. 48 Brockton Avenue.

Q. 5. Were you connected with Craig, Reed & Emerson, Inc.?

A. Yes, sir.

Q. 6. In what capacity?

A. Treasurer.

Q. 7. How long is it since its inception?

A. About ten years,—nine years.

Q. 8. Have you been an officer during that period?

A. Yes, sir.

Q. 9. What duties?

A. Ran the business end of it; finances; office work.

Q. 10. You were the treasurer of the company?

A. Yes, sir.

Q. 11. Did you have charge of the finances?

A. Yes, sir.

Q. 12. Did you arrange the loans?

A. Yes, sir.

Q. 13. In July of 1929 was your company indebted to the Plymouth County Trust Company?

A. Yes, sir.

Q. 14. Do you know the amount?
A. $36,500.
Q. 15. Was that a time or demand note?
A. Demand note.
Q. 16. How long had it been outstanding?
A. Probably two years.
Q. 17. It wasn't reduced at all?
A. No, sir.
Q. 18. It had not been reduced in all that period?
A. I think not.
Q. 19. So that $36,500 was due right down to July of 1929?
A. Yes, sir.
Q. 20. Had any demand been made on you for payment of that note?
A. No, sir.
Q. 21. Had the Plymouth County Trust Company by any of its officers ever demanded payment of that note?
A. No, sir.
Q. 22. Had they ever discussed with you the payment of the note?
A. Yes, sir.
[fol. 57] Q. 23. What date did this discussion take place, if more than one?
A. I can't tell. There were several of them, merely along general lines. Mr. Cooper on two or three occasions told me that he thought it would be nice if we got in condition to pay our loans once or twice a year, if we could, and then reborrow.
Q. 24. Once or twice a year?
A. Yes, sir.
Q. 25. When was that statement made to you?
A. Can't say.
Q. 26. Approximately?
A. Off and on for the last three, four or five years.
Q. 27. What else was said about paying up the loan? Did you tell him your company couldn't pay the loan?
A. No; it wasn't necessary for me to.
Q. 28. You didn't tell him?
A. No; it wasn't necessary; he knew it.
Q 29. These conversations you say took place over a period of three or four years?
A. Yes, sir.

Q. 30. Was there any conversation between you when the note was changed from a time loan to a demand loan in March of 1927?

[Objected to by Mr. Jacobs. Objection overruled.]

A. I don't know.

Q. 31. You had various talks with Mr. Cooper since then?

A. Yes, sir.

Q. 32. Saw him at the bank?

A. Yes, sir; up to a year ago.

Q. 33. Up to a year ago?

A. Yes; since that time I have not been treasurer of the new corporation.

Q. 34. So long as you were treasurer of the old corporation, you saw him often?

A. Very often.

Q. 35. In connection with what matters did you see him?

A. About business conditions, etc.

Q. 36. Discuss your loans?

A. No.

Q 37. Any time prior to July 15, did Mr. Cooper or Mr. Crocker, or anyone representing the bank, in any way notify you that the loan was to be called?

A. No, sir.

Q. 38. Were you present at a conference held at Mr. Davis' office in June, 1929?

A. Yes, sir.

Q. 39. Was Mr. Cooper present?

A. Yes, sir.

[fol. 58] Q. 40. What did he say?

A. Mr. Cooper asked me to repeat to the meeting a statement I had previously made to him in confidence, and I refused to. I don't think Mr. Cooper spoke aloud.

Q. 41. Did he speak to you and tell you what he was willing to do?

A. Nothing was said about that at all; just general conversation.

Q. 42. I assume that general conversation was about the prospect of business; about the prospects of your old company?

A. Yes, sir.

Q. 43. What was the object of the meeting?

A. We were requested to be at the office of the Development Company. I received a telephone call in the fore-

noon from the office of the Development Company to be there at two or three o'clock in the office. Mr. Reed, Mr. Field and myself went down. We didn't know anyone else was to be there. We found the Development Company directors and Mr. Cooper there. The meeting was opened by this remark from Mr. Davis: "The object of this meeting is to determine the best way to continue the business of Craig, Reed & Emerson for the next few months at the smallest possible loss."

Q. 44. Had your company been losing money?

A. Yes, sir.

Q. 45. For how long?

A. Practically since we lost our biggest account.

Q. 46. When was that?

A. 1926.

Q. 47. In 1926 your company had been losing money?

A. As I remember it, yes.

Q. 48. What did they say the object of the meeting was?

A. As I remember it, Mr. Davis said: "To determine the best way to continue the Craig, Reed & Emerson business and lose the least amount of money."

Q. 49. Was that method determined? Did you determine at the meeting how best to continue the business?

A. No.

Q. 50. Did Mr. Cooper talk privately with any of the parties in the conference?

A. Yes, sir; but he did not speak up during the meeting.

Q. 51. He did not speak up at the meeting?

A. Not that I remember.

[fol. 59] Q. 52. With whom did he talk at the meeting?

A. Mr. Davis.

Q. 53. Anyone else?

A. No.

Q. 54. Do you know if Mr. Davis is a stockholder of the Plymouth County Trust Company?

A. I do not know.

Q. 55. Did Mr. Davis speak to Mr. Cooper in your presence at that time?

A. I think not; not that I recall.

Q. 56. Anything said about the business running for a period of three months?

A. Yes, sir.

Q. 57. By whom?

A. I think I started the conversation myself.

Q. 58. Did Mr. Cooper say to you at any time that he was agreeably disposed at that time?

A. No, sir.

Q. 59. Did you have any such conversation with Mr. Cooper?

A. Not that I recall.

Q. 60. At that time, or later?

A. Not that I recall.

Q. 61. Where were you when you received notice of this loan having been called?

A. Down New Haven.

Q. 62. On a business trip?

A. Yes, sir.

Q. 63. Selling shoes?

A. Yes, sir; trying to.

Q. 64. How did you know the loan had been called?

A. By telephone from Mr. Reed.

Q. 65. How did you receive that message?

A. By telephone.

Q. 66. After getting word, what did you do?

A. I started back to Brockton.

Q. 67. Started back for Brockton?

A. Yes, sir.

Q. 68. Did you expect this loan to be called?

A. I did not.

Q. 69. When you got back here to Brockton, whom did you see?

A. That night?

Q. 70. Yes.

A. Mr. Reed.

Q. 71. Who else?

A. The bookkeeper.

Q. 72. Your bookkeeper?

A. Yes, sir.

Q. 73. What is your bookkeeper's name?

A. Miss Woodsum.

Q. 74. Is she in the employ of your present company?

A. Yes, sir.

Q. 75. What is her full name?

A. Edna E. Woodsum.

Q. 76. After talking with Miss Woodsum and Mr. Reed, what else did you do?

A. Went home and went to bed.

[fol. 60] Q. 77. When did you talk with the bank?

A. The next morning—Tuesday morning.

Q. 78. Where?

A. At the bank.

Q. 79. Who was present?

A. Mr. Cooper and I think Mr. Crocker.

Q. 80. Anyone else?

A. Mr. Reed and myself.

Q. 81. Just the four of you?

A. I think so.

Q. 82. What was said?

A. I told Mr. Cooper how surprised I was to get the message in New Haven, and attempted to get Mr. Cooper to change his mind and put this thing off.

Q. 83. What did Mr. Cooper say to that?

A. He said it was too late, the thing had been done.

Q. 84. Anything else said?

A. Very little. The meeting was very short. As I recall it, Judge Thorndike came in at that time with the assignment papers and I believe he advised us to have a directors' meeting, that the assignment might be made legal.

Q. 85. On a directors' meeting or stockholders' meeting?

A. Directors' meeting first and then confirmed by the stockholders' meeting, as I recall it.

Q. 86. Was the assignment executed that day?

A. Not at that time; later in the day.

Q. 87. Why not?

A. We had the directors' meeting later.

Q. 88. When was it you were at the bank?

A. Tuesday morning.

Q. 89. The same day the assignment was executed?

A. Yes, sir.

Q. 90. Did you object to the assignment?

A. We were licked.

Q. 91. You say you were licked?

A. Yes; I protested vigorously but the money was taken; had nothing to run the business with.

Q. 92. To whom did you protest?

Mr. Jacobs: I object to the word protest.

Q. 92a. What did you say, Mr. Craig?

A. I said I didn't think it was fair. We had no warning at all. If we had, we would have been able to raise the money and pay the note. Business simply taken away from us without any warning.

[fol. 61] Q. 93. Did you have a week's notice that the loan was going to be called that following Saturday?

A. We had no warning.

Q. 94. You had no communication from the bank?

A. No, sir.

Q. 95. Were you acquainted with the liabilities of your company as of the date of the assignment?

A. Yes, sir.

Q. 96. Did you have them listed?

A. Yes, sir.

Q. 97. Under your direction?

A. Yes.

Q. 98. Were these liabilities as substantially stated by Mr. Hall?

A. Yes, sir; I should say so.

Q. 99. What was the amount?

A. $58,000 or so.

Q. 100. What were the assets? What did the assets consist of?

A. Cash, accounts receivable, inventory, shoes in process, life insurance policies.

Q. 101. Machinery, plant and equipment?

A. Machinery, plant and equipment.

Q. 102. Was your business operated after the assignment?

A. After the assignment I was not there.

Q. 103. After the assignment, you were not there?

A. Only as a visitor.

Q. 104. Did you visit often?

A. Yes.

Q. 105. When you were around the place, did you look at the assets before they were bought?

A. No, sir.

Q. 106. Who conducted the negotiations for the purchase of these assets?

A. The Plymouth County Development Company directors.

Q. 107. The Plymouth County Development Company directors?

A. Yes, sir.

Q. 108. Did you hear Mr. Reed mention the name of Mr. White?

A. Yes; Mr. White is the one who acted for the directors. I should say Mr. White was the main spirit.

Q. 109. He was the one who conducted the sale?

A. Yes.

Q. 110. What is his relationship to Mr. Davis?

A. He is acting president of the Plymouth County Development Company. I question whether he would be called his secretary. I don't know whether he is Mr. Davis' secretary; I don't know. I think he is not.

[fol. 62] Q. 111. Mr. Craig, after the money was taken by the bank and your account closed, could your company have continued in business?

A. No, sir.

Q. 112. Had to close doing business?

A. We had to.

Q. 113. You had purchased the assets of the business; the plant, you had bought the plant?

A. Certain parts of it; yes, sir.

Q. 114. You are familiar with the values?

A. Somewhat.

Q. 115. Were you familiar with the accounts receivable of the company and all the other items of assets of the company?

A. To some extent; Mr. Reed knows more about the values of machinery than I do.

Q. 116. From your knowledge of the value of these assets, and the appropriation by the bank on July 12th of $15,000, how did you leave your company financially?

[Objected to by Mr. Jacobs. Objection sustained.]

Q. 116a. The accounts receivable were approximately how much?

A. I don't remember.

Q. 117. You haven't any figures here?

A. No, sir. These figures were all taken by the trustee or assignee; all our old records.

Q. 118. And where are these records?

A. Either the trustee or assignee has them.

Q. 119. And where are the books of Craig, Reed & Emerson now?

A. In the hands of the trustee or assignee.

Q. 120. During recess, did you refer to the testimony you gave to the trustee in bankruptcy?

A. Yes, sir.

Q. 121. Did it refresh your memory?

A. Yes, sir.

Q. 122. Did it refresh your memory as to a conversation with Mr. Cooper as to a remark made by Mr. Cooper?

A. Yes, sir.

Q. 123. Where was that remark made?

A. During the meeting spoken of at the Plymouth County Development Company in June.

Q. 124. What was that remark?

A. At the end of the meeting Mr. Davis turned to Mr. Cooper and said: "What do you say, Joe?" And Mr. Cooper's reply, as I recall it now, was: "Well, under the circumstances, I think we had better go along with them a little while longer; go out and sell all the shoes you can", or something of that sort.

[fol. 63] Evelyn Mae Mills (sworn).

Direct examination.

By Mr. Cook:

Q. 1. Your name is Evelyn Mae Mills?

A. Yes, sir.

Q. 2. You are employed by the Plymouth County Trust Company?

A. Yes, sir.

Q. 3. I have forgotten what your duties were.

A. Bookkeeper.

Q. 4. In the course of your employment did you have anything to do with the account of Craig, Reed & Emerson, Inc.?

A. Yes, sir.

Q. 5. Did you make the entries on the books or record of the corporation, that is, the Craig, Reed & Emerson books?

A. Yes, sir.

Q. 6. I show you what purports to be a ledger card of the Plymouth County Trust Company bearing No. 22 at the top—Plymouth County Trust Company, ledger sheet. What is that No. 22?

A. Ledger sheet, twenty-second page.

Q. 7. Twenty-second page of that account?

A. Yes, sir.

Q. 8. On the twenty-second page is a notation in pencil; is that your writing?

A. Yes, sir.

Q. 9. Will you read that to us?

A. "Show all checks and deposits to Mr. Crocker."

Q. 10. That is under date of July 10th?

[Objected to by Mr. Jacobs. Objection sustained.]

Q. 10a. When did you make that entry?

A. I should say about the 10th.

Mr. Cook: That is all, Mrs. Mills. I am going to offer this page with the original entry; substitute a photostatic copy.

"Exhibit 6—Ledger Sheet No. 22—Craig, Reed & Emerson account."

Q. 11. Who asked you to make that memorandum?

A. Mr. Crocker.

Q. 12. Did Mr. Crocker tell you why he wanted you to make that memorandum?

A. No, sir.

Q. 13. Did you show checks and deposits to him, the incoming checks?

A. I don't see the incoming checks; just the deposits.

[fol. 64] Q. 14. Did you show him the $15,000 checks deposited on July 13th?

A. Did I show him the checks? I don't see the checks.

Q. 15. You have the deposit slip?

A. Just the deposit slip.

Q. 16. And you showed him the deposit slip from that date on?

A. Yes, sir.

Cross-examination.

By Mr. Jacobs:

X Q. 17. Some time has elapsed, Mrs. Mills, since you wrote those words on this Exhibit 6; that is so, isn't it?

A. Yes, sir.

X Q. 18. You have a definite recollection, have you, as to the date it was written?

A. All I can say is about the 10th.

X Q. 19. About the 10th; can you do any better than that; would you say it was written after business on the 12th?

A. I can't say.

X Q. 20. Assuming that Mr. Crocker would say it was the 12th or 13, would you be prepared to say he was wrong?

A. No.

X Q. 21. Then you really haven't any definite recollections as to dates?

A. No, sir.

X Q. 22. You merely mentioned the date about July 10th because the first date that appears under this column of deposits is July 10th?

[Objected to by Mr. Cook. Objection overruled.]

X Q. 22a. The reason you say about July 10th is because that is the date that appears under this column of deposits, isn't it?

A. No.

X Q. 23. You have no way of fixing the exact date when you wrote it on there?

A. No, sir.

X Q. 24. And you can't tell us whether it was the 10th, 11th, 12th, 13th or 14th?

A. No, sir, I can't tell the exact date.

Redirect examination.

By Mr. Cook:

Q. 25. You have given us your best recollection, haven't you, Mrs. Mills?

A. Yes, sir.

[fol. 65] JOSEPH C. CROCKER, JR. (sworn).

Direct examination.

By Mr. Cook:

Q. 1. What is your full name?

A. Joseph C. Crocker, Jr.

Q. 2. You are a resident of Brockton?

A. Yes, sir.

Q. 3. Your street address?

A. 21 Woodside Avenue.

Q. 4. You are vice-president of the Plymouth County Trust Company?

A. Yes, sir.

Q. 5. How long have you been serving in that capacity?

A. Fifteen years or more.

Q. 6. Mr. Cooper is your president?

A. Yes, sir.

Q. 7. When did he become president?

A. About four years ago.

Q. 8. Are you familiar with the owners of your stock?

A. More or less.

Q. 9. Is Mr. Edgar B. Davis one of your stockholders?

A. No, sir.

Q. 10. Plymouth County Development Company one of your stockholders?

A. Yes, sir.

Q. 11. Is it the largest stockholder?

A. I haven't the stock records here.

Q. 12. They bought in about four years ago?

[Objected to by Mr. Jacobs. Objection overruled and Mr. Jacobs excepted.]

A. I don't know.

Q. 13. It is four years ago that the Plymouth County Development Company invested in the bank for some stock? They acquired their stock?

A. Yes.

Q. 14. When they acquired the stock, Mr. Cooper came in as president?

[Objected to by Mr. Jacobs. Objection overruled.]

A. Yes.

Q. 15. Prior to that date, who had been president?
A. Mr. Emery.
Q. 16. How long had he been president?
A. About two years.
[fol. 66] Q. 17. Is he a young man?
A. No; a man in his 50's.
Q. 18. As vice president of the Plymouth County Trust Company, what did you have to do with the Craig, Reed & Emerson account?
A. Very little.
Q. 19. What do you mean by that?
A. The business was handled mostly by Mr. Cooper.
Q. 20. Mr. Cooper personally handled it?
A. Yes, sir.
Q. 21. What did you have to do with it?
A. As a director I was in contact with it; sat in at some meetings; that is apparently all.
Q. 22. You are a director of the bank?
A. Yes, sir.
Q. 23. You know that this loan has been a time loan for over two years?
A. Has been a demand loan.
Q. 24. Has been a demand loan for over two years and was turned into a demand loan at your suggestion?
A. Not that I recall.
Q. 25. Do you know at whose suggestion it was?
A. No, sir.
Q. 26. Has anything been paid on this demand loan, that is up to July of 1929? On the demand loan I ask now.
A. No, sir.
Q. 27. Not a cent has been paid on it?
A. No, sir.
Q. 28. Did you ask either Craig or Reed for payment at any time?
A. You mean by that a direct request for payment?
Q. 29. Direct or indirect?
A. Indirect; yes.
Q. 30. How often did you make these indirect requests?
A. No stated periods.
Q. 31. Frequently?
A. What do you mean, frequently?
Q. 32. How often did you make these requests?
A. Once a month; might have been once in two months.

Q. 33. Over a period of two months or more?

A. Yes.

Q. 34. The loan was what you had called a "frozen loan", "slow loan"?

A. Yes.

Q. 35. And you have so testified?

A. Yes.

Q. 36. How long had it been a "frozen loan"?

A. Can't state any period. Any loan that is not cleaned up in a year in a bank today is more or less of a "frozen loan".

[fol. 67] Q. 37. Was it a "frozen loan" in 1927, when it was changed from a time to a demand loan?

A. I should say yes.

Q. 38. So for two years or better it has been a "frozen loan" on your books?

A. Yes.

Q. 39. Did you make a demand around July for your loan, in July of 1929?

A. No.

Q. 40. When did you call your loan?

A. 13th of July.

Q. 41. And you called it after you had already appropriated money on it? The day following?

A. The day following; yes. On the 12th the loan had been called. I offset the balance on the 12th, sent the letter on the 13th.

Q. 42 When you offset the balance on the 12th of July, did you call in the loan on that day?

A. Yes.

Q. 43. When you said the loan was called on the 13th, you didn't mean it, did you?

A. I offset the balance and called the loan on the 12th, and sent the letter on the 13th.

Q. 44. Then on the 15th you also made an appropriation of the bank balance?

A. Yes, sir.

Q. 45. When did you first notify the Craig, Reed & Emerson Company of what you had done?

A. The 13th.

Q. 46. And that is the letter you said you sent them on the 13th?

A. Yes.

Q. 47. Do you know when that letter reached them?

A. I have the registered receipt. Registered receipt signed by H. B. King, July the 17th.

[Offered as exhibit. "Exhibit 7—Registered receipt signed by H. B. King, July 17th, 1929."]

Q. 48. On Monday, July 15th, did you have a telephone conversation with anyone connected with Craig, Reed & Emerson Company?

A. I don't recall.

Q. 49. You were here this morning? You heard Mr. Reed testify?

A. I don't recall his statement.

Q. 50. Did you see Mr. Reed at your bank on Monday afternoon?

A. I met Mr. Reed; whether it was Monday or Tuesday, I don't know.

Q. 51. Where did you meet Mr. Reed?

A. At the bank.

[fol. 68] Q. 52. What was said at that time?

A. I think Mr. Cooper was the spokesman; I didn't say anything.

Q. 53. Was Mr. Reed alone?

A. I can't say that.

Q. 54. Don't you remember at all?

A. No.

Q. 55. Mr. Cooper handled the transaction so far as you know?

A. Yes.

Q. 56. You just sat in?

A. Yes.

Q. 57. Who was there?

A. I can't tell who was there.

Q. 58. You didn't pay attention to who was there and what was said?

A. I don't recall what was said.

Q. 59. Did I understand you to say you didn't recall who was present?

A. I don't recall who was present.

Q. 60. Did Mr. Reed's testimony of this morning refresh your memory at all?

A. No; I have no recollection of that either.

Q. 61. Did you see Messrs. Craig and Reed in there at a later date?

A. After that date?

Q. 62. Yes.

A. I can't say as to that. May have seen him.

Q. 63. Did you see either of them some time during the week?

A. I may have.

Q. 64. Did you see them in connection with the assignment?

A. I didn't sit in on that.

Q. 65. You didn't sit in on that?

A. No, sir.

Q. 66. Did you have any talk with them at any time before the assignment for benefit of creditors was executed?

A. I think there was some talk either Monday or Tuesday about the assignment.

Q. 67. What meeting are you talking about?

A. The meeting that you asked me who was there; the Monday meeting or Tuesday meeting.

Q. 68. How many meetings were there?

A. The meeting after they were notified that the loan had been called.

Q. 69. Who sat in that meeting and the conversation?

A. I can't recall; all I can recall is that there was something said about assignment.

Q. 70. You don't know who said it?

A. No.

Q. 71. Was Judge Thorndike there?

A. Can't tell you.

[fol. 69] Q. 72. You heard Mr. Hall's testimony this morning?

A. Yes.

Q. 73. You heard him say he was working under your supervision in this matter?

A. Partly.

Q. 74. Partly under your supervision?

A. Yes.

Q. 75. What directions did you give him as to the matter of Craig, Reed & Emerson—the assignment or in connection with the appropriation of the loan? What direction did you give him?

A. I told him to apply the funds on the account, on the note; the funds collected on the note.

Q. 76. When did you tell him that?

A. Friday.

Q. 77. Friday, the 12th?

A. Correct.

Q. 78. Did he apply the collected funds on the note?

A. He applied $4,027.29.

Q. 79. Was this all the collected funds at that time?

A. No, sir.

Q. 80. There were other collected funds on hand at that time, as of July 12th?

A. July 12th, the balance was $5,140.87. We applied $4,027.29 on the note.

Q. 81. Why did you not apply all of it on the note at that time?

A. To the best of my recollection, it was uncollected funds.

Q. 82. So you had applied all the collected funds?

A. Yes, sir.

Q. 83. What was your reason for not applying the uncollected funds?

A. It isn't customary to apply uncollected funds until they are collected.

Q. 84. You had a demand note, didn't you?

A. Yes, sir.

Q. 85. You wanted to be sure, didn't you, that the money would be credited; that you would be able to collect it and get a credit?

A. Yes.

Q. 86. That was the object that inspired you to deal with this $15,000 in the way you did; you wanted to be safe, didn't you, so you sent them by special delivery to the New York bank to collect?

A. Yes, sir.

Q. 87. And asked for telegraphic advices?

A. Yes, sir.

Q. 88. You would be out of luck if you were to give a credit and then that credit had turned out to be worthless?

A. Yes, sir.

Q. 89. So you wanted to make sure that this $15,000 worth of checks were paid before you gave a credit?

A. Yes, sir.

[fol. 70] Q. 90. And you did make sure that they were paid?

A. I did.

Q. 91. The same thing was true of the remainder of that account?

A. Yes, sir.

Q. 92. On July 15th, you weren't quite so careful?

A. Yes, sir.

Q. 93. You took all there was left, collected or uncollected?

A. I assumed it had been collected.

Q. 94. You assumed that the deposit had been collected on the same day?

A. I would have to check back on the deposit to make sure.

Q. 95. There were two small deposits on the 15th?

A. Yes, sir.

Q. 96. The total amount of these two deposits together with the entire balance on hand was applied by your bank?

A. Yes, sir.

Q. 97. These two were collected or uncollected funds?

A. I wouldn't say that.

Q. 98. Do you know the customer for whom Craig, Reed & Emerson were manufacturing, the principal purchaser?

A. Yes; I heard they were making shoes for a large chain store; the name doesn't come to me now.

Q. 99. G. R. Kinney Company?

A. That is the name.

Q. 100. That is the name you have heard mentioned?

A. Yes, sir.

Q. 101. They were also making shoes for other people?

A. That was their big account, the large account—G. R. Kinney Company.

Q. 102. Did you observe when they usually received payment from this large customer?

A. No, sir.

Q. 103. Didn't you observe when the check from that large account usually came in?

A. No, sir.

Q. 104. Did you look into your bank records to see when they usually received payment from this large customer?

A. No, sir.

Q. 105. Did you know that it was about the middle of the month that they ordinarily got payment from them?

A. No; our records just show the name of the bank; the customer isn't listed.

Q. 106. You weren't intimate enough with the affairs of Craig, Reed & Emerson to know that a large check would come in about the middle of July?

A. No.

[fol. 71] Q. 107. Did you send any Craig, Reed & Emerson deposits down to any bank by special delivery for collection?

A. Never had occasion to. We wanted to put them on the note. We wanted to know that they were cashed if we were going to apply their deposit. You make sure the cash is paid before you make an application.

Q. 108. You never had occasion to do it with Craig, Reed & Emerson?

A. Not that particular concern, but we have done the same thing with other people.

Q. 109. When you were going to apply the money?

A. Yes.

Q. 110. I show you the deposit of July 15th: Boston $309, Chicago $1; Cleveland $5 etc., and on the 12th $347.76?

A. Came through Campello bank; came in on Friday; cleared through New York so we could get returns on it Monday.

Q. 111. Same dates on that deposit slip, the 13th?

A. Their stamp is the 13th.

Q. 112. Campello branch is the 13th? The deposit was made at the Campello branch office on the 13th, this $15,000 and the main office on the 15th?

A. Yes.

Q. 113. Here is an East Orange, N. J., check—$314.06; was that cleared on that date?

A. No.

Q. 114. And this deposit of July 13th on a Boston bank came through to your main office on Monday?

A. Yes.

Q. 115. And that hadn't cleared?

A. No.

Q. 116. So looking at these deposit slips, you would say that at the time you appropriated that money on Monday, July 15th, not one of these checks had cleared?

A. I should say it hadn't cleared; no.

Q. 117. Mrs. Mills works under your direction, does she not?

A. Yes, sir.

Q. 118. There was some question come up about pay roll checks?

A. Yes; one pay roll check went back. The party hired counsel and made demand upon us for payment. I acted upon advice of counsel. We were told pay roll checks received preference. As I recall, I told Mrs. Mills to refer to me any checks and deposits. The date I told her that, I don't know.

[fol. 72] Q. 119. Whether it was after the amount was appropriated on the note?

A. You mean after the last appropriation on the note. Some time after the 13th, Saturday.

Q. 120. Some time after Saturday, the 13th?

A. Yes.

Q. 121. Are you sure of that?

A. As far as I can recall now.

Q. 122. You won't say it absolutely?

A. I wouldn't have any reason to put it on before.

Q. 123. You were interested in the deposits, weren't you? Were you expecting these checks from the G. R. Kinney Company?

A. No, sir.

Q. 124. On Friday, July 12th, when you appropriated the $4,000, why didn't you, that day, telephone to Craig, Reed & Emerson and tell them what you were doing?

A. Don't know why; wasn't necessary.

Q. 125. By holding up on the information this deposit came in?

A. Deposited at the Campello branch that night.

Q. 126. When was that made at your Campello branch?

A. Friday night, the 11th.

Q. 127. Did you know that it was down to the Campbello branch?

A. No, sir.

Q. 128. You didn't know the checks were down there?

A. No, sir.

Q. 129. If you did, you would have done that night what you did the next day?

A. Naturally.

Q. 130. You intended on the 12th to apply the money just as fast as you could offset the balance?

A. Yes.

Q. 131. Someone told you that payroll checks which came through were preferred claims, and that they should come before any other offset?

A. Yes; I didn't ask him why; didn't argue; took his word for it.

Q. 132. You expected court proceedings, didn't you?

A. When?

Q. 133. July 12th?

A. There was an assignment, and laborers would have preference; didn't know anything about it until the checks were presented.

Q. 134. When were you told labor would have preference? [fol. 73] A. After there was a test case started; some party obtained counsel; a check came back; made demand for payment.

Q. 135. Was that when you were told labor would have preference?

A. First I knew of it.

Q. 136. When you gave Mrs. Mills directions to put that on you had in mind to allow the labor checks through, they would have preference?

A. Labor checks; all the transactions on the account after that.

Q. 137. One transaction you permited to go through after that?

A. I don't know.

Q. 138. The rent charge was the one you charged up on the account?

A. The rent went through on the account. I assume it was a charge of $375.

Q. 139. You heard Mrs. Mills say she showed you all deposit slips that came in?

A. Yes.

Q. 140. Did she show the deposit slips to you?

A. I don't recall; no slips to show; only two slips on the 15th; no deposit after that.

Q. 141. Why did you say that there were none to be shown you?

A. By the records shows no deposits made.

Q. 142. You say that notation wasn't put on until the 15th?

A. After we offset on the note.

Q. 143. There were three or four offsets; which offset are you speaking of?

A. On the 15th.

Q. 144. That was paid on the note, closing the account; nothing left after closing the account; you expected further deposits?

A. Up to such time that demand was made they made deposits.

Q. 145. You notified them on Monday, the 15th?

A. They didn't get the letter until the 17th.

Q. 146. You telephoned asking them to come and see you. You didn't expect further deposits after that. Now tell me why you didn't notify them on Friday, the 12th of the appropriation?

A. I don't know.

Q. 147. Was it customary to notify customers when their note or notes were called?

A. Customary as a matter of courtesy.

Q. 148. You dind't extend them the courtesy on Friday, [fol. 74] the 12th? When did you notify them?

A. Saturday; Saturday forenoon.

By Referee Ryan:

Q. 149. The 13th?

A. Yes.

By Referee Ryan:

Q. 150. And the date of the registered receipt?

A. The 17th.

Q. 151. Are they in Brockton?

A. Yes, sir.

Q. 152. You called them at their place of business on Monday? You found them there?

A. I don't recall calling them.

Q. 153. You say you didn't?

A. No.

Q. 154. Did you hear Mr. Reed testify that he talked with you Monday and he later called to see you?

A. I heard him say that and I remarked to the party sitting side of me that I didn't recall calling him on Monday.

Q. 155. I believe you testified before that you knew Craig,

Reed & Emerson Company had been losing money for some little while?

A. Their statement showed they were not making any money.

Q. 156. In your previous testimony, you said that they had been slipping for some time?

A. Yes, sir.

Cross-examination.

By Mr. Jacobs:

X Q. 157. Mr. Crocker, did this concern make any financial statements to you; to you, to the bank?

A. Yes, sir.

X Q. 158. Have you got any with you?

A. Auditor's statement for the year ending December 31, 1928.

X Q. 159. When were you given this report, December 31, 1928?

A. Some time after that.

X Q. 160. You looked this report over, when they gave it to you?

A. No; Mr. Cooper went over that. I didn't have the close contact with them at that time.

Mr. Jacobs: I will offer this report as an exhibit.

[Objected to by Mr. Cook. Discussion.

"Exhibit 8"—Statement of condition of Craig, Reed & Emerson, Inc. 1925, 1926, 1927 and 1928.

Admitted as bearing on reasonable cause to believe.]

X Q. 161. Now, Mr. Crocker, it isn't anything unusual to mail over checks to a correspondent bank and ask them to wire when checks are collected?

A. No, sir.

[fol. 75] X Q. 162. Were you the officer of the bank, Mr. Crocker, who made or instructed to make this set-off?

A. No, sir.

X Q. 163. Who did?

A. Mr. Cooper.

X Q. 164. You were working in conjunction with him at the time you made this set-off on the 12th?

A. Yes.

X Q. 165. Did you intend to set off everything that was in possession of the bank, whether the bank or any of its branches?

A. Yes, sir.

X Q. 166. Now, when this set off was made on the 12th, there was in possession of the bank, at the Campello branch, $15,000 in checks?

A. Yes, sir.

X Q. 167. When they came down to the main office on the following day, you followed up the original bookkeeping entry made on the 12th, and by a subsequent entry on the 13th, showing this set-off of $15,000?

A. Yes, sir.

X Q. 168. Merely bookkeeping entry; there weren't any additional checks or funds which came into the bank on the 13th other than what was in there on the 12th?

A. No.

X Q. 169. This registered receipt states that it was received on the 17th by Craig, Reed & Emerson?

A. Yes.

X Q. 170. Do you know what was the cause of the delay on the delivery of that letter?

A. I am not sure, but my recollections are that Mr. Craig or Mr. Reed said they did not receive the letter; that the post office authorities had been told to hold their mail at the post office to be called for. It was not delivered to them at the factory. This is my best recollection of it.

X Q. 171. Do you know whether Mr. Craig or Mr. Reed told you or whether you got the information from the post office?

A. I don't know just what one told me.

X Q. 172. Did you check up to find out why the letter had not been previously delivered?

A. Yes, sir.

X Q. 173. What information did you receive?

[Objected to by Mr. Cook.]

X Q. 173a. Did they say anything to you about this letter, do you remember?

A. You mean when Mr. Reed came to the bank?

[fol. 76] X Q. 174. When Mr. Reed or Craig came to the bank, did they mention the letter?

A. I recall he stated he hadn't received it.

X Q. 175. Did they say anything about it, when they received it?

A. Said they had not received it.

X Q. 176. When was that?

A. The first of the week.

X Q. 177. Did one of them say it was customary for the post office to hold their mail, to be called for?

A. Yes; their mail wasn't delivered. Registered mail as well as regular mail.

X Q. 178. When Craig got back to town he had the letter, didn't he?

A. I don't know.

X Q. 179. You are sure that the letter was mailed on Saturday?

A. Yes.

X Q. 180. The notation on the side goes out. Is that the letter you are referring to?

A. Yes, sir.

X Q. 181. That is your envelope?

—. Yes, sir.

X Q. 182. Does it show it was mailed July 13, 1929?

A. Yes, sir.

Mr. Jacobs: I will read the letter:

July 13, 1929.

Craig, Reed & Emerson, Plain Street, Campello, Mass.

Attention of Mr. W. A. Craig

GENTLEMEN: We hold your demand note dated March 8th, 1927 for $36,000.

This is to advise you we are calling this note for payment as of this date—July 13th, 1929.

Very truly yours, Joseph C. Crocker, Jr., Vice-President.

["Exhibit 9—Letter dated July 13th, 1929 to Craig, Reed & Emerson, Inc."]

X Q. 183. And, Mr. Crocker, you are quite sure that this pencil notation on Exhibit 6, "Show all checks and deposits to Mr. Crocker", was put on some time after July 13th?

A. Yes, sir.

X Q. 184. Would you say it was after July 15th?

A. I can't say.

X Q. 185. You said there was something said about laborers' checks being preferred?

A. Yes, sir.

X Q. 186. Well, would you say it was after the assign-
[fol. 77] ment was made? When was the assignment made?

A. The assignment was made on the 16th. That would be possible, on or about that date.

X Q. 187. The laborers' checks were paid after the assignment was made, weren't they?

A. They were paid by the assignee.

X Q. 188. They were paid by the assignee?

A. There were some checks outstanding previous to the date we offset this balance, checks in circulation.

X Q. 189. Laborers' checks?

A. Yes.

X Q. 190. When they came in they were paid by the assignee?

A. Referred to the assignee.

X Q. 191. Paid by him?

A. I don't know. I referred them to him.

X Q. 192. They were not paid by the bank?

A. No.

X Q. 193. If they were paid, they were paid by the assignee?

A. Yes, sir.

X Q. 194. And that notation was put on that ledger sheet because of the fact that one of the laborers had obtained counsel and was about to start suit against somebody on the check?

A. Yes.

X Q. 195. For that reason you took it up with counsel, Mr. Thorndike?

A. Yes, sir.

X Q. 196. Previous to the date or dates when these offsets were made on the 12th and 13th, there wasn't any attempt on the part of the bank to accumulate deposits for the purposes of set-off, was there?

A. No, sir.

Redirect examination.

By Mr. Cook:

Q. 197. Mr. Crocker, you said the reason that you didn't appropriate the full balance on the 12th was because you

were advised that laborers' checks had preference; is that right? The reason you didn't appropriate the full balance was because laborers had preference and laborers' checks were outstanding?

A. I didn't intend to say that.

Q. 198. Were you reserving the amount in your bank to pay laborers' checks?

A. I don't know.

Q. 199. Until you had offset the balance, you didn't even know there were laborers' checks outstanding?

[fol. 78] A. I knew we did; the pay roll was by checks; checks were in circulation all the time. They paid them by checks.

Q. 200. Laborers' checks were in circulation all the time?

A. Yes, sir.

Q. 201. They came in practically at one time?

A. No.

Q. 202. Didn't these checks come in shortly after they were issued?

A. No; these people would cash them at their grocers', and the grocers would probably give them to some one else and so on; probably wouldn't come in for some time.

Q. 203. Isn't that the unusual item you speak of now?

A. No; that is customary — a good many of them were cashed in stores.

Q. 204. You had a very substantial amount of these coming in? When did the company pay off last before the assignment?

A. I don't know.

Q. 205. Do you know the pay roll dates?

A. No.

Q. 206. Then you didn't know whether there were any checks outstanding or not?

A. Well, a corporation paying off by checks, the checks are in circulation all the time. I assumed there were.

Q. 207. You never reserved any sum of money to pay the pay roll checks?

A. Didn't think about it.

Q. 208. When you appropriated the balance on July 15th, didn't you have in mind the fact that there might be some outstanding checks?

A. Question of pay roll checks came up after the appropriation. Pay roll didn't enter my mind at all until after we had this case come up.

Q. 209. When did that case come up?

A. Some time after the 15th.

Q. 210. How long after the 15th?

A. That happened about the 15th. I assume it was somewhere around that week, and then the pay roll checks were referred to Mr. Hall.

Q. 211. You wanted Mr. Hall to have these checks, didn't you? Mr. Hall as a notary? You didn't want him to protest them?

A. No; as assignee.

Q. 212. Why did you give directions to show these checks to Mr. Crocker and not to Mr. Hall?

A. I have charge of the checks returned in the bank. [fol. 79] Checks presented on the account, I act on these checks as a rule. These checks were presented to me, divided into pay roll checks and checks to creditors. Pay roll checks were turned over to Mr. Hall.

Q. 213. And the checks to creditors were also turned over to Mr. Hall?

A. To be protested as a notary.

Q. 214. He acted in a dual capacity, as notary and assignee. You had them divided out in pay roll checks and checks which were merchandise checks? Would the bookkeeper do it for you?

A. No.

Q. 215. Did you divide them into pay roll checks and checks to creditors?

A. I assume I did.

Q. 216. Did you make the division yourself or some clerk?

A. No. How would a clerk know about it, about pay roll; she wouldn't know.

Q. 217. The clerk wouldn't know?

A. How would she know?

Q. 218. I don't know. Some of the checks might have been marked.

A. They weren't marked pay roll checks.

Q. 219. Even if they were pay roll, why were they preferred over the other checks and paid by the assignee?

A. I don't know.

Q. 220. Mr. Hall of your bank paid the checks?

A. We turned them over to Mr. Hall.

Q. 221. You turned them over to Mr. Hall to pay and the money cleared through your bank, didn't it?

A. I don't think the assignee's account was carried at our bank at that time. He didn't make a sale until September. He had a balance at the Home National Bank.

Q. 222. Did the assignee have any account at your bank?

A. I don't know.

Q. 223. He had an account at the Home National Bank; that is, Mr. Hall as assignee had an account at the Home National Bank?

A. Yes, I think so.

Q. 224. How much did he pay out on these checks?

A. I don't know.. He handled these transactions.

Q. 225. Can't you tell by looking at your bank records whether these pay roll checks were paid through your bank?

A. No; he had the old account of Craig, Reed & Emerson, [fol. 80] and when the assignment was made he found a balance at the Home National and the account was taken over by Mr. Hall as assignee.

Q. 226. You told Mr. Jacobs that these checks aggregating $15,000 were not handled out of the usual course, the regular course of your business?

A. What do you mean?

Q. 227. Is it a custom in your business for you to send these checks in the manner in which they were sent?

A. Well, we were going to offset the deposit and we wanted to send them along by special delivery letter.

Q. 228. Customary only in that light?

A. All items are subject to collection, and we act accordingly.

Q. 229. So you adapted this special procedure on these funds?

A. No other way to do it.

Q. 230. It could have been sent by ordinary mail?

A. It could.

Q. 231. It could have been sent by ordinary mail but instead you elected to send it by special delivery?

A. Yes.

Q. 232. You elected also to send a telegram along?

A. We didn't get any reply as to the collection of the item. They didn't wire as we requested. We expected them to wire.

Q. 233. They were so slow you sent a telegram?

A. Yes.

Q. 234. Anything unusual about that—slow in making returns on checks; and you wanted to act quickly, didn't you?

A. I waited a reasonable time from Friday to Saturday noon for returns and I sent the wire.

Q. 235. In regard to this matter of checks, did you have any other advice of counsel, except on these pay roll checks at that time?

A. No.

Q. 236. The only advice you had was in regard to the reference of wages?

A. Yes.

Q. 237. Have you a telephone connection with your Campello branch and the main office?

A. Private line.

Q. 238. You could telephone right down and find out just what they had on hand in regard to any customers?

A. Yes, sir.

Q. 239. Did you telephone, Mr. Crocker, and ask what they had on hand there of Craig, Reed & Emerson's?

A. No, sir.

Q. 240. During these two or three days?

A. No, sir.

[fol. 81] Q. 241. Did you instruct them to notify you when checks came in?

A. No, sir.

Q. 242. Did Mr. Cooper, that you know of?

A. No, sir.

Recross-examination.

By Mr. Jacobs:

X Q. 243. This Campello branch is merely a receiving branch, isn't it?

A. Yes, sir.

X Q. 244. Everything is cleared, just kind of a desk where customers leave deposits and they are sent to the main office either that day or the next day?

A. Yes.

X Q. 245. Any necessity of any telephone calls?

A. No, sir.

X Q. 246. Everything coming in down there is accepted and sent to your main office to be recorded. What was in the branch office was there and was sent up to the main office the next day?

A. Yes, sir.

X Q. 247. And the voucher would have been made of the receipt of these checks on the day previous?

A. Yes.

X Q. 248. If Campello receives a check on the 11th, the mere fact that that check comes to your main office on the 12th, the books show that it was received on the 11th just the same?

A. Yes.

X Q. 249. On the deposit of $15,000 on the 11th of July, it made no difference whether it was left in the branch office or the main office, it was in the bank?

A. Yes, sir.

Redirect examination.

By Mr. Cook:

Q. 250. Was everything cleared through each day?

A. When they closed up their Campello branch, they took the stuff over to the main office. If some deposit came in late it was carried over until the next day.

Q. 251. Ordinarily everything received in the Campello branch on the 10th of the month is in the main office on the 10th of the month?

A. I don't know.

Q. 252. But was this $15,000 so handled; was it in the main office on the same day?

A. It was in the main office that night.

Recross-examination.

By Mr. Jacobs:

X Q. 253. And the next day the bookkeeping entries were [fol. 82] made; and, of course, in the transactions you found the check or checks from Craig, Reed & Emerson?

A. Yes.

X Q. 254. You weren't expecting anything and you weren't looking for any deposits of any size? It just happened that it was there that time?

A. Yes.

Redirect examination.

By Mr. Cook:

Q. 255. Ledger card, page 22, is in evidence; this is page 21; does that show the deposits during the month of June of 1929?

A. Yes.

Q. 256. When was the principal deposit made?

A. June 24th.

Q. 257. How much was it?

A. $8,700.

Q. 258. Deposit on June 11th, $6,249.26, and deposit on June 12th, $835.22. On June 12th there were two deposits, and not one amounted to as much as $1,000?

A. No.

Q. 259. Referring to the May transactions, May deposits, down to May 13th there were four deposits, not one of which amounted to as much as $800?

A. No.

Q. 260. On May 13th there was a deposit of $5,308?

A. Yes.

Q. 261. May 15th, $1,546; May 16th, $1,723. Referring to April of 1929, from April 1st down to April 12th there were five deposits, not one of which amounted to as much as $300?

A. No.

Q. 262. April 13th, $13,000 deposit; April 23d, April 26th, $15,000?

A. Yes.

Q. 263. Now March; on March 11th, there was a deposit of $3,000 odd, and on March 12th, $11,609.05; March 13th, deposit of $3,016.67?

A. Yes.

Q. 264. In looking at these records of yours, it appears that the principal deposits were made about the middle of the month?

A. On these records, yes.

Q. 265. I am going to show you the records of Loring H. Hall, as assignee, with your bank; that is it, isn't it?

A. Yes, sir.

Q. 266. Do you know how many of these were pay roll checks?

A. No, sir.

Q. 267. You find quite a number of small items, 11, 31, 46, 41, do you not?

A. Yes.

Q. 268. Do those look like pay roll items to you?

A. Can't tell you.

[fol. 83] By Referee Ryan:

Q. 269. He asked you if you didn't think they looked like pay roll checks, not if they were pay roll checks.

—. ——.

Q. 270. There are various small items like $7.26, 7.35, 8.14, 29.92, all coming in August; were these pay roll checks?

A. I don't know. I can't tell. They might look like pay roll checks. I can't tell.

Q. 271. Do you know where the rest of this assignee's account is?

A. No, I don't, Mr. Cook.

JOHN JOSEPH COOPER (sworn).

Direct examination.

By Mr. Cook:

Q. 1. Mr. Cooper, what is your full name?

A. John Joseph Cooper.

Q. 2. You live here in Brockton?

A. On Samuel Avenue—29 Samuel Avenue.

Q. 3. You have been president of the Plymouth County Trust Company for three or four years?

A. Yes, sir.

Q. 4. You became president at the time the Plymouth County Development Company acquired a substantial interest in your bank?

A. I don't recall. In 1927, I believe. In 1927; in June of 1927.

Q. 5. When you became president?

A. Yes, sir.

Q. 6. Do you know when the Plymouth County Development Company acquired this interest in your bank?

A. I don't.

Q. 7. The two weren't in any way connected?

A. No, sir.

Q. 8. You were vice-president before you became president?

A. Yes, sir.

Q. 9. Who was your predecessor?

A. Mr. John L. Emery.

Q. 10. He went out about the time Mr. Davis and his company acquired a substantial interest in your bank?

A. They have been stockholders for several years.

Q. 11. There has been in your bank since March of 1927 a demand loan, or there was a demand loan of $36,500 due you by Craig, Reed & Emerson?

A. We have a demand loan; had a demand loan of $36,500. Can't give you the exact date; had been running from year to year.

[fol. 84] Q. 12. Had it been a time loan?

A. Yes, sir.

Q. 13. As you testified previously, back in 1927 it was changed to a demand loan?

A. I believe I looked at the records at the last hearing.

Q. 14. You have your records here?

A. I think so.

Q. 15. What is the date?

A. March 8th, 1927.

Q. 16. The indebtedness has been outstanding for some while prior to March of 1927?

A. Yes.

Q. 17. You were unwilling to extend the loan as a time loan?

A. We thought it better to have it as a demand loan.

Q. 18. You have referred to it as a "frozen loan"?

A. Yes.

Q. 19. Your directors were dissatisfied with the account?

A. Yes.

Q. 20. The loan was under question for quite a long while?

A. Yes.

Q. 21. They had discussed the loan with you?

A. Yes.

Q. 22. They wanted you to liquidate it?

A. Naturally.

Q. 23. Will you tell us what you did towards carrying out the directors' instructions? What did you do to carry out the wishes of the directors?

A. Nothing I could do.

Q. 24. You knew they couldn't pay it? Wasn't worth the effort to ask them to pay it?

A. I don't know about that.

Q. 25. Did you ask them to pay?

A. They knew the loan was a dissatisfied account.

Q. 26. How did you know they knew it?

A. It was originally $40,000 and then reduced by $3,500.

Q. 27. More than two years back, however, you say the loan was $40,000?

A. At one time it was $40,000, and then it had been reduced by $3,500 to $36.500; stayed at that figure for quite a while.

Q. 28. For more than two years stayed at that figure?

A. Whatever the records show.

Q. 29. Nothing has been paid on this demand loan?

A. No.

Q. 30. Tell us what you did towards carrying out the wishes of your directors in getting this loan paid.

A. I had no instructions from the directors. The loan was a "frozen loan".

[fol. 85] Q. 31. You didn't like the loan?

A. No.

Q. 32. What did you do towards correcting this situation?

A. Simply had to carry it in the ordinary course of business. They couldn't pay without closing the business up, probably.

Q. 33. They wouldn't pay the loan?

A. No.

Q. 34. Wasn't worth the while to ask them to pay the loan?

A. I didn't say that.

Q. 35. It would mean that they would have to close the business?

A. They couldn't pay $36,500 without wiping out the business.

Q. 36. Winding up the business would mean a big loss?

A. I suppose so.

Q. 37. What has been your experience?

A. Not especially good; not very favorable.

Q. 38. In July of 1929 you called the loan?

A. Yes.

Q. 39. Previously you had been in conference to the Plymouth County Development Company, some time in June?

A. Some time, March to June; I don't know when.

Q. 40. At that time had you agreed to carry the loan for a period of three months?

A. No, not that I know of.

Q. 41. Did you or didn't you?

A. I didn't agree to anything.

Q. 42. You didn't agree to it?

A. No.

Q. 43. No agreement was made?

A. If anybody entered into an agreement at that time, I would have referred it to the board of directors.

Q. 44. You were there under their direction?

A. Acted as president of the bank.

Q. 45. What prompted you to call the loan in July of 1929?

A. Negotiations were going on for three or four months for more capital; couldn't see where they were going to get more money; losing money at the time; no business, so to speak.

Q. 46. You wanted the business closed up; is that right?

A. I did not exactly put it that way. They were not going ahead.

Q. 47. You consulted counsel, didn't you?

A. Our counsel is one of our board.

[fol. 86] Q. 48. You consulted counsel about this Craig, Reed & Emerson matter in July of 1929?

A. Before we applied the loan; yes.

Q. 49. Judge Thorndike?

A. Yes.

Q. 50. That was with respect to your right to call the loan and take the money?

A. Yes, sir.

Q. 51. And apply the balance?

A. Yes, sir.

Q. 52. Did you personally give the direction to apply the balance?

A. We talked things over. Mr. Crocker was present with Judge Thorndike, and we decided to call the loan.

Q. 53. When was that decision made?

A. What I think it was—the exact date?

Q. 54. The approximate date.

A. The date the money was applied, on the 12th.

Q. 55. On the 12th?

A. That was the time we had the conference.

Q. 56. Did you say anything about calling the loan or that you were going to call them the following Saturday and wanted them to do something definite? Didn't you testify that you would give them until the following Saturday within which to do something?

A. I think I told them something down to the Development Company; never talked to Mr. Craig or Mr. Reed any time whatsoever. I simply asked them to do something and stated that unless something was done we were going to do something forthwith.

Q. 57. You fixed Saturday; was the date Saturday, July 13th, for that?

A. Not for that.

Q. 58. I believe you told me you had no confidence in the company, in the business, in your previous examination?

A. I believe the figures showed they were making no progress.

Q. 59. You had no confidence in the future of the business, you told me?

A. Whatever I said.

Q. 60. You didn't have any confidence in the future of the business?

A. Didn't look very prosperous.

Q. 61. Therefore you called the loan; and when you called the loan, you had arranged with Judge Thorndike to have [fol. 87] an assignment for benefit of creditors made?

A. He was called in and suggested that they make an assignment.

Q. 62. That is, you suggested?

A. Yes, sir.

Q. 63. That was before the assignment was made?

A. Naturally.

Q. 64. And when you discussed with him the expectancy of calling the loan, the thing was talked over at the time?

A. When the loan was called there was only one thing to do, make an assignment.

Q. 65. You knew that the loan was called and an assignment was drawn. That conference, of course, took place some time prior to the time the loan was actually called?

A. Yes, sir.

Q. 66. How long prior?

A. I think the latter part of that week, the 11th or 12th.

Q. 67. You say around the latter part of that week; Friday of that week you started calling the loan?

A. It was either Thursday or Friday; I am not sure which.

Q. 68. Thursday or Friday of that week?

A. Yes.

Q. 69. Who selected Mr. Hall for the assignee?

A. We suggested it. I believe I may have suggested it; I think I suggested it.

Q. 70. Was he an assignee for benefit of creditors?

A. *Yes, sir.*

Q. 71. That is, after your bank had taken all the cash, you were willing to assign the balance?

A. Yes, sir, if that is the way you want to put it.

Q. 72. That is what you did. Mr. Hall was to act as assignee for the benefit of creditors after you had applied all the cash there was available?

A. As you put it; yes.

Q. 73. Wasn't that a fact? He acts as assignee for the benefit of creditors after you took the cash. At the time of the examination, trustee's examination, this question was asked you: "Did you not also say that the company was solvent?" Answer: "I didn't have to."

A. I don't think that I did.

Q. 74. Do you remember that question?

[Objected to by Mr. Jacobs. Objection sustained.]

Q. 74a. In your opinion, was this company insolvent, Mr. [fol. 88] Cooper?

A. Couldn't pay their bills; what would you call it? You call it insolvent, perhaps.

Q. 75. If they started to liquidate, could they pay their bills?

A. Insolvent in plain words.

Q. 76. You knew they would have to close the business if you appropriated the money?

A. Yes, sir.

Q. 77. You intended they stop?

A. We went as far as we wanted to.

Cross-examination.

By Mr. Jacobs:

X Q. 78. You had been vice-president for a number of years?

A. Yes.

X Q. 79. And while Mr. Emery was the president?

A. Yes.

X Q. 80. Mr. Emery became ill, didn't he, and resigned from the presidency?

A. Yes, sir.

X Q. 81. And you were elected president and took his place?

A. Yes, sir.

Redirect examination.

By Mr. Cook:

Q. 82. You were familiar with the sale made by Mr. Hall?

A. I was away on my vacation.

Q. 83. You knew the purchase price?

A. The terms of the sale were communicated by telephone.

Q. 84. You knew the assets were being sold at a price and you knew the price?

A. Yes, sir.

Q. 85. You knew the terms of the sale?

A. I can't recall.

Q. 86. And that the sale price constituted 25 percent to creditors, plus expenses?

A. Yes.

Q. 87. You consider that a fair price for the assets?

A. Yes.

Q. 89. You are repeating something you heard?

A. I was not; I was on my vacation.

Q. 89. You are repeating something you heard?

A. Yes, sir; I was away on a vacation.

Q. 90. The creditors' meeting was in August?

A. I was away on a vacation.

Cross-examination.

By Mr. Jacobs:

X Q. 91. Your election as president had nothing to do with the Plymouth County Development Company, did it?

A. No.

[fol. 89] X Q. 92. They own some stock in the bank, but you were vice-president when Mr. Emery went out. You moved up and took his place?

A. Yes, sir.

X Q. 93. You were at the meeting at the Plymouth Development Company, where there where a whole lot of men and you were discussing the affairs of the Craig, Reed & Emerson Company, and do you remember Mr. Davis going over and saying to you: "What you do say, Joe; don't you think under the conditions we ought to play along with them?" Do you recall that?

A. I can't recall.

X Q. 94. There was no agreement to give any further time to Craig, Reed & Emerson?

A. Nothing definite that I know of.

X Q. 95. At that meeting at the Plymouth Development Company, was your loan, the bank's loan, to Craig, Reed & Emerson in any way discussed?

A. Not that I recall.

X Q. 96. Was Judge Thorndike one of your directors on the twelfth day of July?

A. Yes, sir.

X Q. 97. Now the first thing with reference to offsetting the deposit of Craig, Reed & Emerson was the talk with Judge Thorndike, one of your directors, on the twelfth day of July?

A. Yes, sir.

X Q. 98. Do you remember definitely whether it was at that time or some later time that the question of Craig, Reed & Emerson making an assignment came up?

A. I think it was simultaneously.

X Q. 99. Didn't you have some talk with some officer or officers of Craig, Reed & Emerson, Inc., about assignment?

A. Not that I recall.

X Q. 100. Did you know how they were going to take the offset of this money? How did you know how Craig, Reed & Emerson were going to take this offset of money?

A. I didn't know.

X Q. 101. Why should the bank be concerned with the question of assignment then?

A. We felt it was the best way to clean it up and suggested to Craig, Reed & Emerson to make an assignment.

X Q. 102. There was no agreement with Craig, Reed or Emerson, or any official of their company, to have them [fol. 90] deposit this money and then have the bank take this money as an offset?

A. Absolutely not.

X Q. 103. There was no agreement with Craig, Reed & Emerson that the bank should be allowed to take this money and they later would make an assignment?

A. Absolutely not.

X Q. 104. As I understand the situation, you just offset the money, and at some later date, after they got a notice, they came in and when they came in the question of assignment was suggested to them?

A. Yes, sir.

X Q. 105. When did they come in; was it the morning of the 16th of July?

A. Well, Mr. Craig and Mr. Reed came in. Mr. Reed came in first. I can't tell the exact date, probably Tuesday. He was surprised he hadn't got our letter and I told him we had called the loan and we suggested that he make an assignment to Loring Hall for benefit of creditors. And he said, "Well, this is all news to me; I wish you would hold off; Mr. Craig isn't here. Mr. Craig has always handled the matter." And I believe that was done. Mr. Craig came in the next morning. He was away. I suggested to him that an assignment for benefit of creditors be made to Loring Hall.

X Q. 106. When did you decide to call the loan?

A. Friday, the 12th.

Redirect examination.

By Mr. Cook:

Q. 107. What did you say to Mr. Craig when he came in to see you on the 16th of July?

A. Told him we decided to call the loan, and I think he said, "I think you have made a mistake"; and I said, "Well, maybe we have, but we are going through with it"; and suggested that he get his attorney to draw the papers for the assignment, I believe.

Q. 108. Suggested going to an attorney?

A. Suggested that he call an attorney; suggested that he call Judge Thorndike.

Q. 109. Do you know whether he called Judge Thorndike?

A. Judge Thorndike handled it.

Q. 110. Judge Thorndike handled the transaction as far as you know?

A. As far as I know. Craig, Reed & Emerson, I think, had Mr. Wilbar; I am not familiar with their counsel.

[fol. 91] Q. 111. Did you and Mr. Wilbar talk the matter over with him at all?

A. No, sir.

Q. 112. Mr. Craig endeavored to persuade you to be more lenient? Did he ask you for more time?

A. I don't think so.

Q. 113. Did he ask you not to call the loan? You told him absolutely that you were through?

A. Yes, sir. As I recall it, Mr. Wilbar acted for Mr. Field.

Q. 114. Mr. Field of Craig, Reed & Emerson?

A. Yes, sir.

Q. 115. Mr. Wilbar, however, acted for the company, did he not?

A. I know nothing about it.

Ansel W. Craig (recalled).

Direct examination.

By Mr. Cook:

Q. 125. Mr. Craig, I show you what purports to be a check book and ask if that is a check book of your corporation?

A. Yes, sir.

Q. 126. And was that the last check book in use by you on the Plymouth County Trust Company?

A. The last one; yes, sir.

Q. 127. What was the amount of the checks which the bank refused payment of and which you had drawn, according to your records?

A. $6,170.94.

Q. 128. And over what period of time had these checks been drawn?

A. A few days; I think from the 13th of July on.

Q. 129. Is there a check book earlier than that?

A. Yes, sir.

Q. 130. Let's add some figures. Checks on this page $698.54. $60.87 on that page. $85.25 on the third page; $25.88 on the 4th; $438.87 on the next page; $1,992; $54.69, $59.16. That check book runs back to July 13th?

A. Yes, sir.

Q. 131. $12.40; $48.53; $99.01; $7.51; $34.75; $25.74; $33.57; $120; $576.78. You have seen enough that these checks go back to about the 10th and not to the 13th?

A. Go back to the 12th.

Q. 132. At least that; at least the 12th. We haven't got $6,000 worth of checks?

A. I should say not. Probably not more than half of that.

Q. 133. Mr. Craig, are you familiar with the book which will have your assets?

A. Yes.

[fol. 92] Q. 134. Have you any amounts to tell us from this trial balance? Just what you had for accounts receivable as of the date of the assignment?

A. Accounts receivable; that is July 16th; must be another balance sheet.

Q. 135. Weren't your books balanced at the time the assignment was made?

A. The books were balanced the first of July.

Q. 136. Didn't the assignee have the books balanced?

A. I don't know. I lost my job the same day.

Q. 137. Don't you know whether the books were balanced as of that date?

A. In my opinion they were, Mr. Cook. I wasn't there.

Q. 138. Are there any books which will show the balance?

A. $12,938.14.

Q. 139. Do you know whether that is the balance as of August 21st?

A. I don't know; yes, August 21st. That is not the date of the assignment.

Q. 140. I am asking about the date of the assignment.

A. I don't know.

Q. 141. Have you your accounts receivable ledger here?

A. Yes, sir.

By Mr. Thorndike: There is a statement made for the creditors dated August 21st, 1929, on the question of the disposal of the entire assets of the concern. That was prepared by Mr. Hall. It was exactly the same on August 21st as on July 16th.

By Mr. Cook:

Q. 142. I show you this statement. There was no substantial change in the affairs of the company between July 16th and August 21st? There could have been no material difference. The differences are very few. Simply the question of finishing a small quantity of shoes in process.

A. No material difference; no.

Q. 143. You had equipment and machinery there, didn't you?

A. Yes, sir.

Q. 144. Did you have it appraised at any time?

A. No, sir.

[fol. 93] ["Exhibit 10"—Statement as of August 21st, 1929; Liabilities, $58,016.36.]

Cross-examination.

By Mr. Jacobs:

X Q. 145. Mr. Craig, you have referred to the statement; I show you your schedules; you signed these schedules, didn't you?

A. Yes.

X Q. 146. And were prepared by you; and in your schedules you show liabilities of $62,279.90. Then that is correct?

A. That is correct.

X Q. 147. $62,279.90, these were the debts of the date of the assignment, July 16th?

A. Yes, sir.

X Q. 148. How do you account for the discrepancy of $58,000 in one place and $62,000 in another?

A. I didn't realize there was any. This is of July 14th, the date of the assignment. These are the bankruptcy papers. They weren't filed until a long time after the assignment.

X Q. 149. At the time of the assignment your liabilities were $58,000 and the bankruptcy papers were filed some time after? Did you swear to these?

By Judge Ryan: In the schedules, debts on open account, the accounts payable amount to $29,000. Difference of $15,000 there. Notes payable holding securities, $18,023.21, to the bank and M. E. Woodsum of Braintree, $2,000. There is a note of $3,000, one of $2,000, that is why. Another note of $2,000, that's seven. One of $16,000, one of $2,000. I have found $9,500 in notes and that leaves $5,000 difference there. Notes payable about the same.

By Mr. Jacobs:

X Q. 150. Now do you know which is the correct figure?

A. Very sure of that.

X Q. 151. Who took it off?

A. Our bookkeeper.

X Q. 152. You don't know yourself whether it is correct? You didn't check up the figures, did you? You didn't check up all these figures?

A. Checked up the balance.

[fol. 94] Loring H. Hall (recalled).

Direct examination.

By Mr. Cook:

Q. 362. Mr. Hall, you have testified as to liabilities this morning; what cash did you receive as assignee?

A. $2,229.99.

Q. 363. That was the cash you received? What did you acquire in the way of accounts receivable?

A. I haven't got the total as to the accounts I received. I got payment on part of these shoes I sold.

Q. 364. Look at this statement as of August 21st, 1929; your accounts were increased by the manufacturing?

A. I would say yes. I didn't get all the money. I sent the shoes out and only collected part of it.

Q. 365. This item represents in part all the uncollected accounts receivable over that period of time?

A. Yes, sir.

Q. 366. That was the face value you put in there?

A. The total value of the shoes.

Q. 367. It is not the actual value?

A. No, sir.

Q. 368. Were they worth as much as the face value?

A. No, sir.

Q. 369. What was the amount of the inventory?

A. $18,131.42.

Q. 370. Was that the book value, please?

A. Yes, sir.

Q. 371. What was the condition of that inventory?

A. The inventory, as I found it, was shot to pieces; the upper leather in small lots, very much cut into; most of the leather was out of date. Sold as scrap leather; more or less cut into. Soles and heelings were of good quality, split in sizes, five apiece of this size, ten apiece of another size. The remainder of the stock in a run down condition.

Q. 372. The statement is the book value?

A. Yes, sir.

Q. 373. Was that in excess of the fair value?

A. Yes, sir.

Q. 374. The shoes in process were run out by you?

A. Yes.

Q. 375. Notes receivable amounted to $2,750; Charles P. Holland and Alvan T. Reed of this company?

A. Yes, sir.

Q. 376. Were these notes ever collected by you?

A. No, sir.

Q. 377. Did you regard them as collectible?

A. No, sir.

[fol. 95] Q. 378. Cash value on life insurance policies?

A. I had correspondence stating that the cash surrender on one policy did not take effect until some time in the future. There was a value of some $800 when that statement was prepared.

Q. 379. Was the value $800 instead of $1,600?

A. Yes, sir.

Q. 380. Trade acceptance of $292.70?

A. Good, and put it in as such.

Q. 381. Due from salesman—$1,468.91?

A. I consider that worthless.

Q. 382. Did you make any effort to find out the fair value of the machinery and equipment?

A. Yes, sir.

Q. 383. Did you have an expert go over it?

A. Yes, sir.

Q. 384. And appraise it for you?

A. Yes, sir.

Q. 385. As a result of his appraisal, what figure did you place on the machinery? Where did you get this figure $47,011.21?

A. From the books.

Q. 386. Did you regard that as a fair figure?

[Objected to by Mr. Jacobs. Objection sustained.]

Q. 386a. Did you have any talk with the buyers regarding the value of the machinery?

A. Talked with the purchasers.

Q. 387. Did you have any talk with the new purchaser, Hogan, or Craig and Reed in regard to the value of that machinery in the plant?

A. Yes.

Q. 388. You did have some talk?

A. Not on the appraisal value.

Q. 389. Not concerning the appraisal value, concerning the actual value?

A. Concerning the purchaser's value.

Q. 390. What was said?

[Objected to by Mr. Jacobs. Objection sustained.]

Q. 390a. You had the legal title to the property as assignee, and you had it up for sale?

A. Yes, sir.

Q. 391. Then, as the owner of the property, did you get a figure that was acceptable to you?

A. Yes, sir.

Q. 392. And did you get a figure, in your opinion, that was a fair value of that property?

A. Yes, sir.

Q. 393. The total selling price for these assets was under $20,000?

[fol. 96] [Objected to by Mr. Jacobs.]

By Judge Ryan:

Q. 394. You just finished off the stock in process, and the shoes you finished were sold?

A. Yes, sir.

By Mr. Cook:

Q. 395. Have you any record of what you received in that way?

A. I would have to refer to Craig, Reed & Emerson.

Q. 396. Was that included in the cash—$3,241.92?

A. No, sir.

Q. 397. That was later?

A. Yes, sir.

Q. 398. This cash you received, $2,292, where did you get that from?

A. From the bank account I was able to disclose at another institution.

Q. 399. Nothing from the Trust Company?

A. No, sir; $2,229.99 was on deposit in the Home National Bank.

Q. 400. In the name of Craig, Reed & Emerson?

A. Yes, sir.

Q. 401. Is that in this $3,241.92?

A. Yes, sir.

Q. 402. Where did you get the funds to take care of payroll checks—collected some of the accounts?

A. Yes, sir.

Q. 403. Payroll checks which were issued prior to the date of the assignment, did you make these checks good?

A. Yes. I issued another check in its place.

Q. 404. You took the check from the employer and exchanged checks?

A. Yes, sir.

HERBERT C. THORNDIKE (sworn).

Direct examination.

By Mr. Jacobs:

Q. 1. What is your full name?

A. Herbert C. Thorndike.

Q. 2. You are a director in the Plymouth County Trust Company?

A. I am.

Q. 3. When is the first time anyone of the bank spoke to you on the Craig, Reed & Emerson matter?

A. In my capacity as a director, I heard the notes read at the directors' meeting, since my election, I think, in 1927. As attorney my advice was sought on Friday, July 12th, 1929.

Q. 4. Who consulted you on that date?

A. Mr. Cooper.

Q. 5. With reference to what?

A. In consequence of a telephone call that I was wanted at the bank, I went over there some time in the morning of [fol. 97] Friday, the 12th, 1929. I met Mr. Cooper and Mr. Crocker. Mr. Cooper called my attention to the amount on deposit of Craig, Reed & Emerson, which was around $15,000, as I recall it, and asked me if the bank, in my opinion, had the right to set off that amount against the note held by the bank. I asked him if that note was a demand note or had matured and he replied that it had. I told him, in my opinion, the bank had the right to apply whatever the balance was in its hands on account of this demand note on that day. I have a memorandum in my diary which shows that I consulted them on that morning.

Q. 6. When were you next consulted with reference to this Craig, Reed & Emerson matter?

A. I should say it was the day the assignment was drawn; the 16th of July, some time in the morning, as I recall it.

Q. 7. Result of a telephone call?

A. It was the result of some word I got, probably a telephone call from the clerk or stenographer, and in consequence I went to the bank.

Q. 8. Did you draw up an assignment some time or other that day?

A. I did.

Q. 9. Before or after you talked with Mr. Craig or Mr. Reed?

A. After.

Q. 10. Who was present at the conference at the bank?

A. When I arrived at the bank, Mr. Reed and Mr. Craig, and Mr. Cooper, as I recall it, were in the back private office at the Plymouth County Trust Company. I came in and met them there.

Q. 11. Do you remember the conversation at that time?

A. In substance I do.

Q. 12. Will you give it to us?

A. It is substantially this—that in consequence of the taking of the money, it was necessary for them to make an assignment and I think Mr. Cooper told me that they wanted me to prepare an assignment, and I told them I would meet them at my office that afternoon at 2 o'clock. I asked who the directors were and they told me. I don't remember all of them, I remember Mr. Craig, Mr. Reed and Mr. Field, and I think there were two other men who repre- [fol. 98] sented some workmen in the factory, who had some few shares. I can't recall any more conversation at the meeting. That is about all I can remember.

Q. 13. You had to get a waiver of notice from Mr. Field?

A. I did.

Q. 14. You saw Mr. Wilbur?

A. I did. I communicated with Mr. Wilbur and got Mr. Field's waiver. I first communicated with Mr. Wilbur by telephone and he told me that he would obtain for me Mr. Field's waiver and later I did get the waiver, some two or three days after that, I should say.

Q. 15. One other thing—with reference to this advice on pay roll checks, were you at some time consulted with reference to these pay roll checks?

A. Yes.

Q. 16. When was that?

A. I can't tell you exactly; two or three days later along in the following week; Tuesday or Wednesday, as I recall it; the week beginning the 15th.

Q. 17. Who consulted you regarding it?

A. I think first Mr. Hall and then Mr. Crocker.

Q. 18. Do you remember what you told them?

A. I remember I told them substantially that these workmen were preferred creditors and, if there was money enough to pay off the workmen in full; that in my opinion they ought to get their money. I advised Mr. Hall to pay the workmen. They were preferred claims and he was justified in paying them. That is substantially what I told Mr.

Hall and almost exactly, as I recall, what I told Mr. Crocker.

Cross-examination.

By Mr. Cook:

X Q. 19. Judge Thorndike, you have told us when you were first consulted in regard to the appropriation of the balance around $15,000?

A. I think so.

X Q. 20. Was the question of the lawful right to appropriate that money taken up with you at that time?

A. I think so.

X Q. 21. Did they ask you whether it would constitute a preference?

A. It wasn't put in that expressed form. They asked me whether the bank had a right to take that money and apply it to their note, and I told them they did.

[fol. 99] X Q. 22. And the consequence of the application would be that the business would have to close down and there would be a failure?

A. Nothing like that was expressed at that time.

X Q. 23. Judge Thorndike, and the only question asked you at that time was whether they had a right to apply the money?

A. Yes.

X Q. 24. Did you look it up?

A. I had been asked the question at least once before with reference to somebody else, and I had gotten a book, "Paton's Digest"; and in that conference with Mr. Cooper that morning I think I referred to "Paton's Digest". I know I said something about it, and I looked it up again and made a pencil mark in the book.

X Q. 25. And that reference to Paton's banking, whatever the title is, was your only reference?

A. All that I can recall.

X Q. 26. Plus your own knowledge of the law?

A. Yes.

X Q. 27. The officers of the bank had not taken up with you the question of the assignment for benefit of creditors?

A. Not at that time.

X Q. 28. They didn't talk it over with you?

A. Not with me.

X Q. 29. Did they discuss it among themselves?

A. I don't know whether it was mentioned among themselves or not.

X Q. 30. About the pay roll checks, you say that came up subsequent to the assignment?

A. Yes.

X Q. 31. That was, it came up very close to the assignment?

A. Little subsequent.

X Q. 32. Not that Friday?

A. Some time along the first of the week, either Monday or Tuesday, or probably Wednesday; Tuesday or Wednesday of that week, to the best of my recollection, Mr. Hall wanted advice about payroll checks.

[fol. 100] Exhibits

EXHIBIT 2

July 12, 1929.

National City Bank, New York, N. Y.

GENTLEMEN: We enclose herewith checks amounting to $15,100.78 drawn by the G. R. Kinney Co. Inc.

Will you kindly collect the same placing credit to our account and advising us immediately by wire.

Very truly yours, —— ——, Asst. Treas.

LHH/M.

EXHIBIT 3

July 13, 1929.

National City Bank, 55 Wall Street, New York, N. Y.

GENTLEMEN: We call to your attention the following transaction:

Under date of July 12th we sent you by early mail three checks amounting to $15,100.78, drawn by the G. R. Kinney Co. Inc. These checks were sent direct by special delivery. We asked you to wire immediately payment. We wired

you again today at eleven o'clock relative to the payment of the same, and up to the writing of this letter, twelve-thirty, have not received any answer.

We cannot understand the delay and we would thank you to give us some explanation relative to the same.

Very truly yours, Joseph C. Crocker, Jr., Vice-President.

JCC/D.

EXHIBIT 4

[On Western Union telegram form]

July 13/29.

To National City Bank, 55 Wall Street, New York, N. Y.:

Please advise fate G. R. Kinney Co. checks fifteen thousand odd received by you this day.

Paid.

Plymouth County Trust Company.

(Here follow Exhibits 5 and 6, side folios 101 & 102 and 103 & 104)

112A

101-102

EXHIBIT 5

PLYMOUTH TRUST COUNTY COMPANY

DEPOSIT TO CREDIT OF

E-F-J

Craig. Reed & Emerson Inc.

BROCKTON. July 11. 1929.

In receiving items for deposit or collection, this Company acts only as depositor's collecting agent, and assumes no responsibility beyond the exercise of due care. All items are credited subject to final payment in cash or solvent credits. This Company will not be liable for default or negligence of its duly selected correspondents nor for losses in transit, and each correspondent so selected shall not be liable except for its own negligence. This Company or its correspondents may send items, directly or indirectly, to any bank including the payor, and accept its draft or credit as conditional payment in lieu of cash; it may charge back any item at any time before final payment, whether returned or not. Also any item drawn on this Company not good at close of business on day deposited.

PLEASE STATE NAME OF BANK ON WHICH BROCKTON CHECKS ARE DRAWN

ALL OTHERS NAME OF PLACE ONLY. LIST EACH CHECK SEPARATELY.

	DOLLARS	CENTS
BILLS		
GOLD		
SILVER		
CHECK ON		
New York, N.Y. BANK	100	78
" " " "	5000	
" " " "	5000	
" " " "	5000	
"	15100	78
"		
"		
"		
"		
"		
"		

EXHIBIT 6

Card No._____

EXHIBIT 6

PLYMOUTH COUNTY TRUST COMPANY
BROCKTON, MASS.

22

Name Craig Reed & Emerson Inc

Address

OLD BALANCE	DATE	CHECKS			DATE	DEPOSITS	DATE	NEW BALANCE
		AMOUNT BROUGHT FORWARD						
5,914.86	Jl 8'29	19.57-						
5,895.29	Jl 9'29	17.53-	50.00-	10.54-			Jl 8'29	5,895.29*
	Jl 9'29	70.00-	100.00-					
5,647.22	Jl 9'29	5.00-	5.36-				Jl 9'29	5,647.22*
5,636.86	Jl 10	11.18-					Jl 9'29	5,636.86*
5,961.90	Jl 11	604.57-	2.82-	35.00-	Jl 10	336.22	Jl 10	5,961.90*
	Jl 11	5.11-						
5,314.40							Jl 11	5,314.40*
5,657.79	Jl 12	375.00-	128.23-	5.36-	Jl 11	343.39	Jl 11	5,657.79*
	Jl 12	8.33-						
5,140.87	Jl 12	12.00-	2.50-	255.50-			Jl 12	5,140.87*
	Jl 12	4,027.29-						
843.58	Jl 13	3.14-					Jl 12	843.58*
840.44	Jl 13	50.00-					Jl 13	840.44*
790.44	Jl 13	15,100.78-					Jl 13	790.44*
					Jl 13	15,100.78	Jl 13	790.44*
790.44	Jl 15	100.00-	6.04-		Jl 15	347.76	Jl 15	1,032.16*
1,032.16								
1,348.72	Jl 15	347.76-	1,000.96-		Jl 15	316.56	Jl 15	1,348.72*
							Jl 15	.00*

Show all checks + deposits to the Cashier

1128

103-104

[fol. 105] EXHIBIT 9

[On Plymouth County Trust Company Letterhead]

Brockton, Massachusetts, July 13, 1929.

Craig, Reed & Emerson, Inc., Plain Street, Campello, Mass.

Attention Mr. A. W. Craig

GENTLEMEN: We hold your demand note dated March 1, 1927, for $36,500.

This is to advise you that we are calling this note for payment as of this date, Saturday, July 13th.

Very truly yours, J. C. Crocker, Jr., Vice-President.

JCC/D.

[In lead pencil:] Rec'd July 17, 29, 10 o'clock.

[In ink:] Rec'd July 17, 1929, at C. R. & E.'s office, one o'clock. E. W. Notified over telephone Monday morning, July 15, 1929. (Mr. Crocker to Mr. Reed.)

[On face of envelope:] Plymouth County Trust Company, Brockton, Massachusetts. [Cancelled 20 cent postage stamp.] Craig, Reed & Emerson, Plain St., Campello, Mass.

[Stamped:] 0181. Registered. Return receipt requested.

[On back of envelope:] Brockton, Mass. Registered Jul. 13, 1929. Brockton, Mass. Registered Jul. 13, 1929. Brockton, Campello Sta., Mass. Registered Jul. 13, 1929. Brockton, Campello Sta., Mass. Registered Jul. 13, 1929.

[fol. 106] IN UNITED STATES DISTRICT COURT

PETITION OF PLYMOUTH COUNTY TRUST COMPANY FOR APPEAL—Filed January 29, 1931

To the Honorable James A. Lowell, District Judge:

The above-named Plymouth County Trust Company, feeling aggrieved by the decree rendered and entered in the above-entitled case on the nineteenth day of January,

1931, does hereby appeal from said decree to the Circuit Court of Appeals for the First Circuit, for the reasons set forth in the assignment of errors filed herewith; and it prays that its appeal be allowed, and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the First Circuit, sitting in Boston, under the rules of said court in such cases made and provided.

Plymouth County Trust Company, by Its Attorneys,
Jacobs & Jacobs.

Allowed January 29, 1931. —— ——, District Judge.

In United States District Court

Assignment of Errors of the Plymouth County Trust Company—Filed January 29, 1931

And now comes the Plymouth County Trust Company and files the following assignment of errors upon which it will rely upon its prosecution of the appeal in the above-entitled case from the decree made by this Honorable Court on the nineteenth day of January, 1931:

1. The court erred in finding that the Plymouth County Trust Company had received a preference in the amount of $20,476.79.

2. The court erred in ruling that the Plymouth County Trust Company had received a preference in the amount of $20,476.79.

[fol. 107] 3. The court erred in finding that the set-off of $4,027.29 on July 12, 1929 by the Plymouth County Trust Company was a preference.

4. The court erred in ruling that the set-off of $4,027.29 on July 12, 1929 by the Plymouth County Trust Company was a preference.

5. The court erred in failing to rule that the Plymouth County Trust Company had a banker's lien on the checks totalling $15,100.78 deposited on July 11, 1929.

6. The court erred in failing to rule that the Plymouth County Trust Company had a banker's lien on the uncollected checks deposited in the Trust Company previous to July 12, 1929.

7. The court erred in failing to rule that the Plymouth County Trust Company had the right to offset all moneys on deposit in the Trust Company on July 12, 1929.

8. The court erred in ruling that the Plymouth County Trust Company did not have the right to offset the proceeds of all checks in possession of the Trust Company on July 12, 1929, irrespective of when the proceeds of said checks were received.

9. The court erred in failing to rule that the Plymouth County Trust Company had the right to offset the proceeds of all checks deposited in the bank before July 12, 1929, even though the proceeds were received subsequent to July 12, 1929.

10. The court erred in failing to rule that the Plymouth County Trust Company could exercise its right of set-off at any time before bankruptcy.

11. The court erred in finding that Craig, Reed & Emerson, Inc., was insolvent on July 12, 1929.

12. The court erred in ruling that there was any proper evidence as a basis for the finding that Craig, Reed & Emerson, Inc., was insolvent on July 12, 1929.

13. The court erred in ruling that there was any evidence [fol. 108] to show that the liabilities of Craig, Reed & Emerson, Inc., exceeded its assets on July 12, 1929.

14. The court erred in failing to rule that the Plymouth County Trust Company, in receiving checks for collection was entitled to retain them as security for any debt to the bank of the depositor.

15. The court erred in failing to rule that the Plymouth County Trust Company had the right to retain all uncollected checks as security for any debt owed to the bank by the depositor.

16. The court erred in failing to rule that the set-off by the Plymouth County Trust Company of any deposit of

Craig, Reed & Emerson, Inc. within four months of bankruptcy was not a preference.

17. The court erred in failing to rule that there was no transfer by Craig, Reed & Emerson, Inc. to the Plymouth County Trust Company within four months of bankruptcy.

18. The court erred in ruling that a referee in bankruptcy has jurisdiction to hear a suit to recover a preference, even with the consent of the alleged preferred creditor.

19. The court erred in ruling that the referee, with the consent of the alleged preferred creditor, had jurisdiction to hear and determine the question as to whether the alleged preferred creditor had received a recoverable preference.

20. The court erred in ruling that a referee has jurisdiction, with the consent of the alleged preferred creditor, to determine in a summary way whether said creditor had received a preference.

21. The court erred in ruling that the referee, although both the trustee and the alleged preferred creditor consented to it, had the right to hear a petition filed by the trustee to have the alleged preferred creditor repay to the estate certain sums as preferences.

22. The court erred in ruling that the referee had the right, even with the consent of an alleged preferred creditor, [fol. 109] to determine and order the repayment of a recoverable preference.

Plymouth County Trust Company, by Its Attorneys,
Jacobs & Jacobs.

IN UNITED STATES DISTRICT COURT

WAIVER OF APPEAL BOND—Filed January 29, 1931

It is agreed that on the petition of the Plymouth County Trust Company for appeal from the decree of this court dated January 19, 1931, no bond need be given on the appeal.

Walter J. MacDonald, Trustee, by His Attorneys,
Phipps, Durgin & Cook, R. A. B. Cook.

Citation, in usual form, showing service on Walter J. MacDonald, omitted in printing.

[fol. 110] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 111] (MEMORANDUM.—Orders of enlargement of time for docketing case to, and including, April 21, 1931, are here omitted. A. I. Charron, Clerk.)

IN UNITED STATES CIRCUIT COURT OF APPEALS, FIRST CIRCUIT

PETITION OF PLYMOUTH COUNTY TRUST COMPANY FOR APPEAL
—Filed January 29, 1931

To the Honorable United States Circuit Court of Appeals for the First Circuit:

And now comes the Plymouth County Trust Company, a banking corporation duly organized under the laws of the Commonwealth of Massachusetts, with a usual and principal place of business in the City of Brockton, in the District of Massachusetts, and petitions the Court to allow it an appeal from a decree rendered and entered in the above entitled case by the District Court for the District of Massachusetts on the 19th day of January 1931; for the reasons set forth in the assignment of errors filed herewith; and it prays, upon the consideration of the record hereto attached, which contains a certified copy of all the pertinent proceedings in connection with the decree, that its petition be allowed, and that the decree of the United States District Court for the District of Massachusetts be reversed.

Plymouth County Trust Company, by Its Attorneys,
Jacobs & Jacobs.

IN UNITED STATES CIRCUIT COURT OF APPEALS

ASSIGNMENT OF ERRORS—Filed January 29, 1931

(MEMORANDUM.—The Assignment of Errors being identical with the assignment of errors filed in the District

Court and printed at pages 106-109, are here omitted. A. I. Charron, Clerk.)

IN UNITED STATES CIRCUIT COURT OF APPEALS

STATEMENT OF CASE—Filed January 29, 1931

Craig, Reed & Emerson, Inc., a concern manufacturing ladies' shoes in Brockton, Massachusetts, owed the Plymouth County Trust Company $36,500 for some considerable period of time.

On May 8, 1927, the loan was changed from a time loan to a demand loan, and remained a demand loan down to and after the date of the assignment on July 16, 1929.

In June 1929, the President of the Plymouth County Trust Company, Mr. Cooper, was asked to come over to the Plymouth Development Company, to the office of Mr. Davis, who happened to be a preferred stockholder of Craig, [fol. 112] Reed & Emerson, Inc. When Mr. Cooper arrived, Mr. Reed, Mr. Field, Mr. Craig, all officers of Craig, Reed & Emerson, Inc. were there, as were the directors of the Plymouth Development Company, a charitable organization controlled by Mr. Davis, who was a Brockton philanthropist.

The meeting was opened by a remark by Mr. Davis to the effect that "The object of the meeting was to determine the best way to continue the business of Craig, Reed & Emerson, Inc. for the next few months at the smallest possible loss."

Mr. Cooper was present at the meeting, but did not speak, and did not say what he would do.

On August 21, 1929, the assignee sent to every one of the creditors, a statement of the assets and liabilities, showing assets of $88,531.36 and liabilities of $58,016.36. The assignee ran the business until September 27, 1929, and a bill of sale as of that date was introduced in evidence, over the objection of the bank, showing a sale of the assets for $14,330.

On July 11, 1929, Craig, Reed & Emerson, Inc. deposited four out of town checks, totalling $15,100.78 in the Campello branch of the Plymouth County Trust Company, and

they were delivered to the main bank, either the same day after closing hours or the next morning.

On the 12th of July 1929, the bank set off the balance on deposit and any securities it had of Craig, Reed & Emerson, Inc., against the amount which was owed by Craig, Reed & Emerson, Inc. on its demand note to the bank.

At the time of the set-off, there was on deposit in the bank over $5000. and the bank set off $4027.22 on the note of Craig, Reed & Emerson, Inc., and also deducted $375. for rent owed to the bank by Craig, Reed & Emerson, Inc.

There was no evidence anywhere in the case showing any collusion between the bank and the depositor. As a matter of fact, the depositor protested against the set-off.

The bank immediately took steps to find out whether the out of town checks of $15,000.78 (sic) were good, and on learning on July 13, 1929 that the out of town checks were good, it offset the amount of said checks on the aforesaid loan of Craig, Reed & Emerson, Inc.

The trustee filed a petition with the Referee that the bank be ordered to turn over to the trustee, the amount of the set-offs, and that said set-offs be declared to be preferences.

Both the bank and the trustee agreed to try said question before the Referee, who found that the bank had received a preference of $16,108.49, with interest from the date of adjudication.

Both parties reviewed said decision before the District Judge, who reversed the Referee, and found that the bank had received a preference of $20,476.79, disallowing the [fols. 113 & 114] offset of $4,027.29 allowed by the Referee.

The petitioner claims that not only has the Referee no jurisdiction to hear a preference suit, even though the parties consent, but also that the bank had a perfect right to offset any balance in the bank at the date of the set-off, and also had the right under its banker's lien, to seize all uncollected checks deposited by the depositor, and apply the proceeds on any loan of the depositor owed to the bank.

Plymouth County Trust Company, Petitioner, by
Its Attorneys, Jacobs & Jacobs, Joseph B. Jacobs.

On October 13, 1931, this cause came on to be heard by the court, Honorable George H. Bingham and Honorable

Scott Wilson, Circuit Judges, and Honorable George F. Morris, District Judge, sitting.

Thereafter, to wit, on November 21, 1931, the following Opinion of the court was filed:

[fol. 115] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, OCTOBER TERM, 1931

No. 2541

PLYMOUTH COUNTY TRUST COMPANY, Creditor, Appellant,

v.

WALTER J. MACDONALD, Trustee, Petitioner, Appellee

Appeal from the District Court of the United States for the District of Massachusetts

Before Bingham, Wilson, and Morris, JJ.

OPINION OF THE COURT—Filed November 21, 1931

WILSON, J.:

Craig, Reed & Emerson, Inc., a corporation doing business in Brockton in the Commonwealth of Massachusetts, was duly adjudged a bankrupt on October 14, 1929, and the case under the usual order authorized by General Order XII was referred by the District Court to a referee in bankruptcy.

The appellee was elected trustee and thereupon filed a petition with the referee, setting forth that the appellant within four months of the filing of the petition in bankruptcy had applied certain funds of the bankrupt on deposit with it to a demand note of the bankrupt held by it, knowing at the time that the bankrupt was then insolvent; and that such application constituted a preference under Sec. 60 (b) of the Act.

Without filing an answer to the petition, it sufficiently ap- [fol. 116] pears from the record that the facts set forth in the petition at a hearing before the referee were denied by the appellant, and that the appellant claimed the right to apply the funds on deposit with it to its debt. An issue was thereby raised properly determinable only in a plenary suit; Louisville Trust Co. v. Comingor, 184 U. S. 18, 26;

Babbitt v. Dutcher, 216 U. S. 102, 113; Weidhorn v. Levy, 253 U. S. 268, 273; Harrison, Trustee, v. Chamberlin, 271 U. S. 191, 193; Galbraith v. Vallely, 256 U. S. 48, 49; In re Rathman, 183 Fed. 913.

By inference from the record the jurisdiction of the referee to hear the matter was informally questioned before the referee, counsel for appellant before the hearing stating: "If we are to consent to jurisdiction here, I had supposed there was absolutely no question whatever as to your hearing the case in all its phases and trying as a plenary suit."

Counsel for trustee replied: "If there is any question to be raised about the jurisdiction, I want that question to come forward now, Mr. Jacobs."

Mr. Jacobs, counsel for the appellant, then said: "There is no question about the jurisdiction, but we don't waive any rules of evidence in a plenary suit. We consent to the jurisdiction with the understanding that it is to be tried under the rules of evidence in a plenary suit."

While the appellant apparently refused to submit to summary proceedings with the referee, the effect of this colloquy, we think, was a consent by the appellant to hear the matter before the referee, if in the conduct of the hearing it was treated as a plenary suit.

The issues, therefore, are whether a referee in bankruptcy has jurisdiction under a general order of reference to hear and determine matters properly determinable only in a plenary suit; or if summary proceedings are begun before a referee by a trustee in bankruptcy to determine the right of a trustee to property formerly of the bankrupt, but held by a third party under a substantial claim of right,—even though the form of the proceedings may be waived in a court of competent jurisdiction, Harrison, Trustee, v. [fol. 117] Chamberlin, supra,—a referee can acquire jurisdiction by consent of the parties; or if consent be given, whether on review before a district court or an appellate court, advantage can be taken of a lack of jurisdiction in the referee.

That a referee in bankruptcy under a general order of reference has no jurisdiction, either in a summary proceeding or a plenary suit, to recover property in the possession of a third party prior to bankruptcy, if held under a substantial claim of right, was settled in the cases of Louisville

Trust Co. v. Comingor, supra, and Weidhorn v. Levy, supra, in which latter case the court said:

"We find nothing in the provisions of the Bankruptcy Act that makes it necessary or reasonable to extend the authority and jurisdiction of the referee beyond the ordinary administrative proceedings in bankruptcy and such controversial matters as arise therein and are in effect a part thereof, or to extend the authority of the referee under the general reference so as to include jurisdiction over an independent and plenary suit such as the one under consideration. The provisions of the act, as well as the title of his office, indicate that the referee is to exercise powers not equal to or coordinate with those of the court or judge, but subordinate thereto; and he becomes 'the court' only by virtue of the order of reference. In the General Orders the word 'proceedings' occurs frequently, but never in a sense to include a plenary suit. On the other hand, 'proceedings in equity' and 'proceedings at law' are specially dealt with in General Order XXXVII."

* * * * * * *

"Reviewing the entire matter, we conclude that under the language of the Bankruptcy Act and of the general orders in bankruptcy, a referee, by virtue of a general reference under Order XII (1), has not jurisdiction over a plenary suit in equity brought by the trustee in bankruptcy against a third party to set aside a fraudulent transfer or conveyance under Sec. 70 (e) and affecting property not in the custody or control of the court of bankruptcy."

This conclusion of the Supreme Court must also apply to a plenary suit brought under Sec. 60 (b) to recover a prefer- [fol. 118] ence, since the language conferring jurisdiction in such cases on "courts of bankruptcy" is the same as in Sec. 70 (e).

That summary proceedings are not proper to recover possession of property formerly of the bankrupt, and held by a third party under a substantial claim of right, was conclusively established in Louisville Trust Co. v. Comingor, supra. The right of a defendant to insist that proceedings against him to recover such property alleged to have been conveyed as a preference be brought by plenary suit is too well settled to require additional citations, but in addition to the cases above cited see Babbitt v. Dutcher, 216 U. S.

102, 113; Lynch v. Roberson, 287 Fed. 433, 436; In re Vallozza, 225 Fed. 384. The qualification suggested in Harrison, Trustee, v. Chamberlin, supra, and in the cases therein cited, that a defendant may consent to the determination of such issues in summary proceedings before a district court sitting in bankruptcy, contemplates merely a waiver of the form of the proceedings and not a consent conferring jurisdiction, since a district court under the sections above referred to has jurisdiction to determine the issue between the parties.

We think the District Court misapplied the consent clause in Sec. 23 (b), which permits suits by a trustee, other than those mentioned in Secs. 60 (b), 67 (e) and 70 (e) of the Act, to be brought in a district court only by consent of the defendant, unless the district court would have had jurisdiction of an action by the bankrupt if bankruptcy proceedings had not been instituted; Bardes v. Hawarden Bank, 178 U. S. 524. The consent of a defendant conferring jurisdiction under this section has no application to suits by a trustee to recover a preference, or property conveyed in fraud of creditors. Jurisdiction in such cases is expressly vested under the sections above referred to concurrently in "courts of bankruptcy" and in any state court which would have had jurisdiction in case bankruptcy had not intervened. Courts of bankruptcy under Sec. 1 (8) of the Act include the district courts of the United States, but not referees in bankruptcy.

Again, contrary to a ruling by the District Judge, the [fol. 119] word "courts" as used in Sec. 23 (b) is there used in a broader sense than in other parts of the Act; since in this section it includes both state and federal courts, and originally included circuit courts; Bardes v. Hawarden Bank, supra, p. 536. It obviously does not in this connection include a referee, Weidhorn v. Levy, supra, as it may in other parts of the Act under Sec. 1 (7).

The District Court, therefore, erred in ruling that, because a defendant may consent to jurisdiction in the district courts in suits by a trustee, other than suits to recover property under Secs. 60 (b), 67 (e) and 70 (e), or may consent to a summary form of proceedings in such last mentioned cases, when originating in a district court; the defendant in this case could by consent confer jurisdiction upon the referee in proceedings originating before him by petition

to recover an alleged preference, the proceedings being summary in form and the property being in the possession of the defendant prior to bankruptcy and held under a substantial claim of right.

If the proceedings in this case had originated before the District Court, and the appellant had waived its summary nature or it had been a plenary suit, and the District Judge by special order had referred the matter to the referee, the latter could then have heard the same as a master; but a referee under a general order of reference, having no jurisdiction over the subject matter, cannot acquire jurisdiction by consent of parties. Exporters v. Butterworth-Judson Co., 258 U. S. 365; Nixon v. Michaels, 38 Fed. (2d) 420, 423; Chi., B. & Q. Ry. Co. v. Willard, 220 U. S. 413, 420.

The objection to the jurisdiction of the referee before the District Court after the appellant had consented to the referee hearing the matter may have been "unsportsmanlike," as it was characterized by the District Judge; but lack of jurisdiction may be raised on review, and at any stage of the proceedings. In re Petronio, 220 Fed. 269, 273; In re Ballou, 215 Fed. 810, 813; Nixon v. Michaels, 38 Fed. (2d) 420, 423; Louisville Trust Co. v. Comingor, supra, p. 26; M. C. & L. M. Ry. Co. v. Swan, 111 U. S. 379, 382; Chi., B. & Q. Ry. Co. v. Willard, supra, p. 419. A litigant is not bound by the findings of any tribunal having no [fol. 120] jurisdiction over the subject matter, even if found with his consent. The proceedings before the referee were coram non judice.

While it may result in delay in determining the issue between these parties, the decision of the District Court must be reversed with costs, leaving the trustee to proceed by a plenary suit in a court of competent jurisdiction.

The decree of the District Court is reversed and the case is remanded to that court for further proceedings not inconsistent with this opinion; the appellant recovers costs of appeal.

IN UNITED STATES CIRCUIT COURT OF APPEALS

FINAL DECREE—November 21, 1931

This cause came on to be heard October 13, 1931, upon the transcript of record of the District Court of the United

States for the District of Massachusetts, and was argued by counsel:

Upon consideration whereof, It is now, to wit, November 21, 1931, here ordered, adjudged and decreed as follows: The decree of the District Court is reversed and the case is remanded to that court for further proceedings not inconsistent with the opinion passed down this day; the appellant recovers costs of appeal.

By the Court.

Arthur I. Charron, Clerk.

Thereafter, to wit, on the twenty-second day of January, 1932, mandate issued.

[fol. 121] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 122] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 21, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted, and the case is assigned for argument immediately following case No. 700, Page, Trustee vs. Arkansas Natural Gas Corporation.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 36,528. U. S. Circuit Court of Appeals, First Circuit. Term No. 714. Walter J. MacDonald, trustee in bankruptcy of Craig, Reed & Emerson, Inc., petitioner, vs. Plymouth County Trust Company. Petition for a writ of certiorari and exhibit thereto. Filed February 19, 1932. File No. 36,528.

FILE COPY

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Supreme Court of the United States.

October Term, 1931.

No. 714

WALTER J. MacDONALD, Trustee in Bankruptcy of Craig, Reed & Emerson, Inc.,
Petitioner Herein,

v.

PLYMOUTH COUNTY TRUST COMPANY,
Respondent Herein.

In the Matter of
Craig, Reed & Emerson, Inc., Bankrupt.

Petition for Writ of Certiorari to Issue to the United States Circuit Court of Appeals for the First Circuit and Brief in Support Thereof.

ROBERT A. B. COOK,
Attorney for Petitioner.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

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Supreme Court of the United States.

OCTOBER TERM, 1931.

No.

WALTER J. MACDONALD, TRUSTEE IN BANKRUPTCY OF CRAIG, REED & EMERSON, INC.,

Petitioner herein,

v.

PLYMOUTH COUNTY TRUST COMPANY,

Respondent herein.

IN THE MATTER OF

CRAIG, REED & EMERSON, INC., BANKRUPT.

NOTICE.

The respondent is hereby notified that the enclosed petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit, and the annexed brief in support thereof, will be submitted to the Supreme Court of the United States on the first motion day after the expiration of two weeks from the date of the filing thereof, as provided by the rules of said court.

ROBERT A. B. COOK,

Attorney for Petitioner.

Dated February 15, 1932.

Supreme Court of the United States.

OCTOBER TERM, 1931.

No.

WALTER J. MACDONALD, TRUSTEE IN BANKRUPTCY OF CRAIG, REED & EMERSON, INC.,

Petitioner herein,

v.

PLYMOUTH COUNTY TRUST COMPANY,

Respondent herein.

IN THE MATTER OF

CRAIG, REED & EMERSON, INC., BANKRUPT.

PETITION FOR WRIT OF CERTIORARI TO ISSUE TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

To the Honorable the Chief Justice of the Supreme Court of the United States and the Honorable Associate Justices thereof:

The petitioner, Walter J. MacDonald, as he is the Trustee in Bankruptcy of Craig, Reed & Emerson, Inc., respectfully represents and shows to this Honorable Court as follows:

1. On or about July 16, 1929, and at the request and instance of the respondent herein, and after the transactions hereinafter complained of, Craig, Reed & Emerson, Inc., made and executed a general assignment for the benefit of creditors unto one Loring H. Hall, an officer of the respondent company. Thereafter, and on the 28th day of September, 1929, a creditors' petition in bankruptcy was filed against the said Craig, Reed & Emerson, Inc., in the District Court of the United States for the District of Massachusetts, and upon such petition an adjudication was had. Thereafter, and on the 27th day of November, 1929, your petitioner was elected trustee in bankruptcy, and at once qualified as such trustee.

2. For several years and more prior to its bankruptcy, Craig, Reed & Emerson, Inc., hereinafter referred to, for brevity, as the "company," had been indebted to the respondent in a substantial amount. For twenty-eight months next prior to its bankruptcy the company had made no payment to the respondent on account of such indebtedness, which, throughout the said period, was represented by a demand note. The respondent during that entire period regarded the indebtedness as a "frozen loan"; and it regarded the company as "insolvent."

In June of 1929—a matter of three weeks before the assignment hereinbefore referred to—a meeting of the company's stockholders was held. The only person present or represented at that meeting other than stockholders was the respondent, who was represented by its president. The purpose of the meeting was to determine how the business of the company could be carried along with the least possible loss. An extension was then asked of the respondent. At the hearing before the referee conflicting testimony was given with respect to whether the respondent had assented to the extension there asked. The referee, before whom the case was heard, found that the respondent had agreed to such extension.

The principal outlet for the company's products was a chain of retail shoe stores. These stores paid their bills once a month and about the middle of each month, a fact known to the respondent and so found by the referee. On July 10, 1929, or thereabouts, the respondent, by its officers, caused the following notation to be made on one of the cards upon which the respondent kept a record of its dealings with the company: "Show all checks and deposits to Mr. Crocker." Crocker was a vice-president of the respondent. These directions were carefully followed, as the evidence showed.

Late in the afternoon of July 11, 1929, the company deposited with the respondent certain checks aggregating $15,100.78 which it had received from said chain of retail stores. At the time such deposit was made, the company had to its credit with the respondent a balance of $5140.87, all of which represented funds deposited by the company with the respondent from and after the time of the stockholders' meeting held in June, 1929, or three weeks before such deposit was made. Of the balance then to the credit of the company $4027.29 represented collected funds and the remainder uncollected funds.

On the morning of July 12th, the respondent appropriated on account of its indebtedness the collected funds of $4027.29. At that time the respondent had not called the company's demand loan, nor had it told the company of what it was doing or contemplated doing. The deposit of $15,100.78 was not credited to the company's balance at the time it was made, but was sent with a special letter to the respondent's correspondent bank in New York City for collection, with the request that it wire the respondent when collection was made. The respondent intended to apply this deposit if collected, but was not going to grant credit therefor to the company until it could be certain that the checks had been paid. Otherwise, according to the testimony of one of the officers, the respondent "would have been out of luck."

On Saturday, July 13th, not hearing from the correspondent bank as early as it desired, the respondent telegraphed it inquiring to know the fate of these checks, and a little later in the day one of the officers addressed a letter to the correspondent bank expressing regret at the latter's failure to report. Copies of these communications are to be found in the record, page 100. Later, and on July 13th, the respondent heard favorably from its correspondent, and thereupon the deposit was appropriated. This deposit was never credited to the company's balance, but was entered on the respondent's ledger card as a "wash" transaction on July 13, 1929, or thereafter (see Exhibit 6, Rec. p. 103).

On July 13, 1929, the respondent addressed a letter to the company informing it that its loan was called. Even then the company was not advised of the appropriations by the respondent (Rec. p. 105). This communication was not received by the company until July 17th or thereabouts. On July 15th, however, the respondent, by one of its officers, called the company by telephone and made known to it that it had called the loan and had appropriated the company's bank balance; and, moreover, had by its own counsel prepared an assignment for the benefit of creditors which it was calling upon the company to execute. The officers of the company protested the acts of the respondent. Finding that they could not prevail upon the respondent to undo what it had done, and knowing that it could not go on in business without the funds so appropriated by the respondent, the company executed the assignment planned and prepared by the respondent and its counsel. A sale of the assets of the company was thereafter made by the assignee, and within a day or two following the time of such sale, and on the 28th day of September, 1929, a creditors' petition in bankruptcy was filed, and upon this petition the company was duly adjudicated bankrupt and the petitioner herein was elected trustee. The officer of the respondent who was serving in the capacity of assignee surrendered and de-

livered to the petitioner the funds in his possession derived from the sale of the company's assets, but he and his principal, the respondent, refused to surrender and deliver unto the petitioner as trustee the funds that the respondent had appropriated and amounting in the aggregate to $20,476.79 and comprising appropriations made on July 12th, 13th and 15th. Upon such refusal, the petitioner filed a bill in equity with the referee in bankruptcy, having charge of the administration of the company's affairs, to recover from the respondent the funds so preferentially received by it. The respondent formally consented to the jurisdiction of the referee, and the cause was thereupon heard at length on merits before such referee. The referee made a finding against the respondent, who thereupon took a review to the District Judge.

At the hearing before the latter, and for the first time and notwithstanding its formal consent and its engaging in a hearing on merits before the referee, the respondent questioned the jurisdiction of the referee. The District Judge overruled this contention of the respondent, and, after arguments on both the facts and the law, and after consideration thereof, entered a decree in favor of the petitioner herein. From this decree an appeal was taken to the Circuit Court of Appeals for the First Circuit, and that court, without in any wise passing upon the merits, held in substance that, irrespective of the respondent's formal consent and irrespective of its going to trial on merits before the referee and its peculiar relation to the assets of the estate, the referee was without jurisdiction to hear the suit, and that jurisdiction could not be conferred upon him.

3. This decision appears to be in direct conflict with the decisions of this court rendered in the following cases:

Harrison, Trustee, v. *Chamberlain,* 271 U.S. 191;
Taubel Scott v. *Fox,* 264 U.S. 426;
May v. *Henderson,* 268 U.S. 111—

and is in direct conflict with—

In re Clarence A. Hopkins (C.C.A. 2), 229 Fed. 378 (certiorari denied, 241 U.S. 669).

American Finance Co. v. *Coppard* (C.C.A. 5), 45 Fed. (2d) 154.

Board of Education of Salt Lake City v. *Leary* (C.C.A. 8), 236 Fed. 521.

Gamble v. *Daniel* (C.C.A. 8), 39 Fed. (2d) 447.

Page, Trustee, v. *Arkansas National Gas Corp.* (C.C.A. 8, decided October 5, 1931), 53 Fed. (2d) 27.

Moreover, the decision in the instant case cannot be harmonized with that rendered by the same court (C.C.A. 1) in the case of *Foster* v. *Manufacturers Finance Co.*, 22 Fed. (2d) 609 (certiorari denied, 276 U.S. 633). In the latter case the Finance Company consented to jurisdiction. Nevertheless, the referee in bankruptcy, who heard the alleged preference suit himself, raised the question of jurisdiction. Such question as raised by him was an outstanding part of the record which was before the Appellate Court. While jurisdiction was acquiesced in by the respondent in that case, nevertheless, the court's attention was directed to the issue as raised by the referee and, without adverting to the jurisdictional question, the Appellate Court disposed of the case on its merits.

4. This decision of the Circuit Court of Appeals for the First Circuit produces a contrariety of decisions by Circuit Courts of Appeal and tends to create a misinterpretation and misunderstanding of the decisions of this court, and in consequence it is of great public interest and essential to the proper and orderly administration of the bankruptcy law that this case be reviewed by this court and the final and definite rule of law upon the questions herein involved, and especially the jurisdictional question, be laid down.

5. The interpretations by the lower courts of the decisions of this court bearing upon the jurisdictional question here involved are so utterly irreconcilable that they have served to create doubt as to the meaning and intendment of the principles heretofore enunciated by this court.

6. The merits of this case also involve a question of great public interest; hence it is desirable that they, too, be heard and determined so far as the same may be desirable in this proceeding.

The petitioner further respectfully submits that this petition should be allowed on the grounds stated and for the following specific reasons:

I. The decision of the said Circuit Court of Appeals for the First Circuit is in conflict with the decisions of the Circuit Courts of Appeals for the Second, Fifth and Eighth Circuits, and undoubtedly misconstrues and misinterprets the decisions of this court, and cannot be reconciled with one of its own earlier decisions; hence it is desirable that the rule of law applicable thereto be definitely and finally established by this court.

II. The interpretations by the lower courts of the decisions of this court bearing upon the jurisdictional question here involved are so utterly irreconcilable that they have served to create doubt as to the meaning and intendment of the principles heretofore enunciated by this court; hence it is desirable that the rule of law applicable thereto be definitely and finally established by this court.

III. The merits of the case present a question of great public interest; hence the supervision of this court should be exercised to the end that the rule of law applicable thereto shall be established.

Wherefore the petitioner respectfully prays—

That a writ of certiorari may be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the First Circuit, commanding said court to certify and send to this court a

full and complete transcript of the record and of all of the proceedings in this cause, to the end that said cause may be reviewed as determined by this court, as provided by law; and that it may have such other and further relief as to this Honorable Court may seem appropriate and in conformity with law.

ROBERT A. B. COOK,
Attorney for Petitioner.

I hereby certify that I am of counsel for the petitioner herein, Walter J. MacDonald, Trustee, and that in accordance with the request of said petitioner the foregoing petition has been prepared, and that the allegations contained in said petition are true to the best of my knowledge and belief; and that said petition, in my opinion, is well founded in law and in fact and should be granted.

ROBERT A. B. COOK.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss. BOSTON, February 15, 1932.

Then personally appeared Robert A. B. Cook of Wellesley, Massachusetts, and made oath that he prepared and signed the foregoing petition and that the same is prepared with the consent of and in accordance with the request of the petitioner named therein, and that the allegations contained in said petition are true to the best of his knowledge and belief.

Before me,
MARVIN C. TAYLOR,
Notary Public.

My commission expires Dec. 21, 1934.

Supreme Court of the United States.

OCTOBER TERM, 1931.

No.

WALTER J. MacDONALD, TRUSTEE IN BANRUPTCY OF CRAIG, REED & EMERSON, INC.,

Petitioner herein,

v.

PLYMOUTH COUNTY TRUST COMPANY,

Respondent herein.

IN THE MATTER OF

CRAIG, REED & EMERSON, INC., BANKRUPT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

The proceedings in this case are shown in full in the record and described, we believe, in sufficient detail in the petition herewith (Petition, pp. 3-10). The assets of the bankrupt were at the time of the filing of the petition against it, and at the time of the adjudication and the election of the petitioner as trustee, in the hands of an officer and agent of the respondent herein purporting to act as a common-law

assignee for the benefit of creditors. The bill of complaint filed with the referee was plenary in its character and the case was heard on its merits according to the rules then prevailing in the District Court of the United States for the District of Massachusetts governing the admission and exclusion of evidence. The respondent, by its counsel, in open court, and in the presence of the president, vice-president and other authorized officers of the respondent company, formally consented to the jurisdiction of the court (Rec. pp. 24, 25).

ARGUMENT.

(*I*) *The decision of the said Circuit Court of Appeals for the First Circuit is in conflict with the decisions of the Circuit Courts of Appeals for the Second, Fifth and Eighth Circuits, and undoubtedly misconstrues and misinterprets the decisions of this court, and cannot be reconciled with one of its own earlier decisions; hence it is desirable that the rule of law applicable thereto be definitely and finally established by this court.*

(*II*) *The interpretations by the lower courts of the decisions of this court bearing upon the jurisdictional question here involved are so utterly irreconcilable that they have served to create doubt as to the meaning and intendment of the principles heretofore enunciated by this court; hence it is desirable that the rule of law applicable thereto be definitely and finally established by this court.*

It will be well first to consider the organic law. Under the caption "Jurisdiction of United States and State Courts," section 23 (*b*) of the Bankruptcy Act, as it was originally enacted, provided as follows: "Suits by the trustee shall be brought or prosecuted only in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the pro-

posed defendant." And, thereafter, in 1903, and again in 1910, Congress enacted certain amendments to the law for the purpose of giving greater definiteness to various of its provisions and for the enlargement of the scope of the law. To section 23 (*b*) were added the following words: "except suits for the recovery of property under Section 60, subdivision b; section sixty-seven, subdivision e; and section seventy, subdivision e." And to section 60 (*b*), under the caption "Preferred Creditors," and having to do with the recovery of property preferentially transferred, there was added by way of amendment the following: "And for the purpose of such recovery any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction." There have been no material changes since made in these sections.

When we pause and consider these amendments, it becomes convincingly clear that it was the intention of Congress that courts having to do with the administration of bankruptcy cases should, so far as might be practicable, be vested with jurisdiction over all matters arising in such cases. Prior to the amendments of 1903 and 1910 there was but one class of cases which a trustee in bankruptcy could, as a matter of right under section 23 (*b*), institute in courts administering bankruptcy; and, with these amendments, another class was added. But at all times, both before 1903 and since, such courts have always, and with the consent of the proposed defendant, had jurisdiction over all matters and controversies arising in bankruptcy.

Jurisdiction by consent is in no wise limited or restricted by the amendment of 1903 made to section 60 (*b*). That amendment was merely to conform with the amendment to section 23 (*b*), which latter section was being enlarged in its scope and operation. Congress did not by these amendments disturb the consent provision of section 23 (*b*). Nevertheless, the Circuit Court of Appeals for the First

Circuit, in utter disregard of the provisions of section 23 (*b*) and of its own action in the case of *Foster* v. *Manufacturers Finance Company,* 22 Fed. (2d) 609 (certiorari denied, 276 U.S. 633), wherein the record disclosed that the referee had himself there raised the question of jurisdiction and had decided that by virtue of the consent of the parties, and particularly the consent of the proposed defendant, he was vested with jurisdiction, yet, in the instant case, held that the court before whom this case was initiated or instituted was without the requisite jurisdiction to hear the cause and the decree of the court below was reversed without apparently any consideration of the merits of the case.

It will be observed that these proceedings were begun by a bill in equity, plenary in its character. The case was tried and heard, according to the rules obtaining in the Federal courts with respect to the admission and exclusion of evidence. The proposed defendant had consented to jurisdiction, and it was only after the defendant had fully tried its case and lost that the question of jurisdiction was raised, and that, too, notwithstanding the fact that this question was considered at the very start of the trial and the jurisdictional issue was waived by the proposed defendant, who, through its counsel, in open court and in the presence of authorized officers and agents of the defendant trust company, consented to such jurisdiction. The counsel who then appeared for the defendant are now appearing for it. For this unconscionable breach of agreement, and breach of faith with the court below, the Circuit Court of Appeals for the First Circuit rewards the defendant not only with a reversal of the decree in the court below, but, moreover, allows the defendant costs in connection with its appeal.

So far as the instant case is before this court on the jurisdictional question, that question, when reduced to its simplest proportions, may be thus stated: May a referee in bankruptcy, by and with the consent of the proposed defendant, lawfully hear a petition or bill of complaint for the re-

covery of property under section 60 (*b*) of the Bankruptcy Act.

In the case of *Harrison* v. *Chamberlain*, 271 U.S. 191, 193, 194, the facts were as follows:

Upon a petition by the trustee in bankruptcy for a summary order requiring the respondent to deliver to the trustee certain money in her possession, a demurrer was filed. The matter was referred by the District Judge to the referee in bankruptcy to report his findings of fact and conclusions of law. The referee's report was confirmed, and from the decree of the District Judge an appeal was taken. Whether the case should have gone up on appeal or on petition to revise was also considered. This court in its opinion, at page 193, said: "It is well settled that a court of bankruptcy is without jurisdiction to adjudicate in a summary proceeding a controversy in reference to property held adversely to the bankrupt estate, *without the consent of the adverse claimant* [italics ours]; but resort must be had by the trustee to a plenary suit." And, at page 194: "However, the court is not ousted of its jurisdiction by the mere assertion of an adverse claim; but, having the power in the first instance to determine whether it has jurisdiction to proceed, the court may enter upon a preliminary inquiry to determine whether the adverse claim is real and substantial or merely colorable. And if found to be merely colorable the court may then proceed to adjudicate the merits summarily; but if found to be real and substantial it must decline to determine the merits and dismiss the summary proceeding." In conclusion, and at page 195, this court further said: "As the respondent's objection to the summary jurisdiction of the bankruptcy court was well taken, *and there was no waiver of her right in this respect* [italics ours], Galbraith v. Vallely, supra, 50, the decree of the Circuit Court of Appeals is affirmed."

In the case of *Taubel-Scott-Kitzmiller Company, Inc.*, v. *Fox*, 264 U.S. 426, an order was issued by a referee in bankruptcy to a creditor to show cause why his execution

should not be declared void and the property surrendered to the trustee. The claimant seasonably challenged the court's jurisdiction. At pages 433 and 434 this court said: "Wherever the bankruptcy court had possession, it could, under the Act of 1898, as originally enacted, and can now, determine in a summary proceeding controversies involving substantial adverse claims of title under subdivision (e) of Section 67, under subdivision (b) of Section 60 and under subdivision (e) of Section 70. But in no case where it lacked possession, could the bankruptcy court, under the law as originally enacted, nor can it now (without consent) adjudicate in a summary proceeding the validity of a substantial adverse claim."

The case of *May* v. *Henderson,* 268 U.S. 111, is to like effect.

By other Circuit Courts of Appeals we have the following contra-decisions:

In re Hopkins (C.C.A. 2), 229 Fed. 378, at page 380: "The question was presented to the Trustee whether he would proceed summarily or by plenary suit and he elected the former without objection by the bankrupt, his wife or any one else. Having proceeded without objection, we think it is too late now to present a question which is addressed solely to the form of the proceeding. If the objection had been made at the time the Trustee was required to elect, it is quite possible that the petitioner's contention would have been sustained. But she, apparently, acquiesced in the summary proceedings as the most satisfactory way of disposing of the question and we are of the opinion that it is too late to present the question on this review by an Appellate Court."

In *Whitney* v. *Barrett* (C.C.A. 5), 28 Fed. (2d) 760, at page 761: "This was a summary proceeding. In such a proceeding the bankruptcy court is without jurisdiction to determine a controversy in reference to property adversely held without the consent of the adverse claimant."

In re Rochford (C.C.A. 8, Sanborn, Thayer, Van Devanter, JJ.), 124 Fed. 182, at page 186: "The district court sitting in bankruptcy has no jurisdiction over a controversy between the trustees in bankruptcy and the adverse claimant over the title or possession of property in the custody of the latter and in the absence of his consent." In this case the proceedings arose before a referee in bankruptcy, and the referee was the court of first instance.

In the case of *Board of Education of Salt Lake City* v. *Leary* (C.C.A. 8), 236 Fed. 521, the court there likewise held that the lower court could proceed summarily only by and with the consent of the proposed defendant.

It is of interest, too, that, apart from the instant case, the two latest pronouncements on the subject have come from the Eighth Circuit. In the case of *Gamble* v. *Daniel,* decided in 1930, 39 Fed. (2d) 447, at page 453, the court said: "If such possession be in the bankrupt, the court of bankruptcy has jurisdiction by summary proceedings to adjudicate the rights of the parties; while, if such possession be elsewhere, the adjudication must be by plenary suit in the proper federal or state court, if the claimant objects to a summary proceeding in the bankruptcy court. This rule has been so often announced that it is necessary to cite only the latest cases." See cases there cited.

In the case of *Page, Trustee,* v. *Arkansas National Gas Corporation* (C.C.A. 8, decided 1931), 53 Fed. (2d) 27, opinion by Circuit Judge Kenyon, at page 34: "The party claiming to hold adversely in the present case brought the action in intervention and consented thereby to the jurisdiction." Later, at page 35: "In 5 Remington on Bankruptcy, section 2195, page 280, it is said: 'Jurisdiction may be conferred on the bankruptcy court by the defendant's consent, in cases where otherwise it has no jurisdiction, and if adverse claimants in possession of the property who would otherwise not be within the jurisdiction of the bankruptcy court, nevertheless voluntarily surrender custody of the

property, or consent to the jurisdiction of the bankruptcy court, then the question of ownership, and all other questions in relation thereto, as, for instance, the extent, validity and priority of liens upon and interests in the property, may be tried out in the bankruptcy proceedings.'" The court also held, at page 36: "We are satisfied that the bankruptcy court had jurisdiction to try in a summary proceeding the question of title to the Bilyou lease raised by the Lyvers intervention on the grounds: (a) That it had possession in the sense of 'custodia legis' of the property involved, or (b) that Lyvers consented to its jurisdiction and did not object to the summary form of the proceeding until the referee had made his order."

From the foregoing it will appear that in the Page case consent was implied, while in the instant case express consent was given. A number of the District Courts have likewise held that jurisdiction in summary proceedings over adverse claimants can be acquired by consent.

In re Steuer (D.C. Mass.), 104 Fed. 976.
In re White Satin Mills (D.C. Minn.), 25 Fed. (2d) 313.

The principles hereinbefore enunciated are not to be confused with the unlawful premise that a trustee can implead, before a referee in bankruptcy, an adverse claimant without his consent. So far as the authorities holding that this cannot be lawfully done are, by obiter or otherwise, authorities for any other contention, then it is in support of the position here taken by the petitioner. See *Weidhorn* v. *Levy*, 253 U.S. 268. There a suit was brought, plenary in character, before a referee in bankruptcy for the purpose of setting aside a transfer of property as provided in section 70 (*e*). The respondent in the suit never consented to jurisdiction, nor had he in any wise invested jurisdiction in the court, but at all times objected to the latter's exercising jurisdiction over the case. In line with its earlier decisions, this

court there held that the trustee in bankruptcy could not, without the consent of the adverse claimant, implead him before a referee in bankruptcy.

There are many authoritative cases holding to like effect that substantial adverse claimants cannot, upon petition and without consent, be impleaded in a summary proceeding, but these cases are not here in point.

It will also be borne in mind that in the instant case the respondent not only appropriated the bankrupt's balance and certain deposits as previously stated, but, moreover, and immediately thereafter, obliged the bankrupt company to assign all its property to an officer of the respondent herein. As to the property so assigned, neither the respondent, nor its officers or the assignee, raised any question whatsoever about the summary jurisdiction of the court, but surrendered all such property or the proceeds thereof to the court. As to the bankrupt's balance and deposits that had been appropriated by it, the respondent set up claims of adverse ownership. As will be seen from the authorities hereinbefore cited, it is well within the power of the referee to determine whether the respondent's claims are merely colorable in character or, on the other hand, are made in good faith and are substantial.

Harrison, Trustee, v. *Chamberlain, supra.*

III. The merits of the case present a question of great public interest, and the supervision of this court should be exercised to the end that a rule of law applicable thereto may be established.

The question hereunder may be thus stated: May a bank or a trust company rightfully assert a banker's lien on funds received by it at a time when it is possessed of knowledge of its customer's insolvency and when it intends to appropriate such deposits as that customer might thereafter make with it?

Treating with the elements involved:

(A) *Insolvency.*

Hall, who was the assignee under the assignment for the benefit of creditors and an officer of the respondent herein, testified that the assets of the company had been sold by him for $14,330.01, which amount represented the fair value of all the assets of the company both as of the time of the assignment and of the time of the sale, and also as of the times of the said set-offs or appropriations, which were within four days of the assignment; and that the liabilities of the said company at such times and after the set-offs or appropriations as aforesaid were $58,016.36.

The president of the respondent testified that he regarded the company as insolvent (Rec. p. 88) as of said times; hence, upon the admission of the respondent, the company was insolvent as of the times complained of.

(B) *Reasonable cause to believe that preference would be created.*

There can be no controverted issue under this question, for the respondent, by one or more of its officers, who had charge of the transactions between it and the company, had knowledge of the insolvency of the company as of the times complained of and, therefore, not only had reasonable cause to believe, but actually knew, that the appropriations or set-offs made by it would operate to give it a larger percentage of its indebtedness than would be received by other creditors of the company of the same class.

The president of the respondent testified before the referee that he knew that it was futile even to ask the company for payment—he knew that the loan could not be paid without wiping out the business. He knew that to insist upon payment meant closing down the business (Rec. pp. 85, 88), and he also knew that the company was insolvent. Substantially

the same knowledge was possessed by Crocker, the vice-president. He knew the loan was a "frozen" one and could not be collected. Consequently, and in the light of the knowledge possessed by it, the respondent not only had reasonable cause to believe that the appropriations or set-offs made by it would operate to give it a larger percentage of its indebtedness than would be received by other creditors of the same class, but actually knew that such would be the result. One of the outstanding authorities governing this principle of law is the case of *Merrimack Nat. Bank* v. *Hollis R. Bailey et al.* (C.C.A. 1), 289 Fed. 468 (certiorari denied, 263 U.S. 704).

(C) *Were the collected funds on deposit with the appellant on July 12, 1929, subject to a lawful set-off or appropriation by the appellant?*

> "Bank creditors are subject to exactly the same rule of law as to preferences and set-offs as are merchandise and other creditors."
>
> *Merrimack Nat. Bank* v. *Hollis R. Bailey et al.* (C.C.A. 1), 289 Fed. 468, 470.

The collected funds of $4027.29 represented deposits made with the respondent by the company subsequent to the time of a certain stockholders' meeting held some three weeks prior to July 12, 1929, the date of the first appropriation or set-off.

The president of the respondent was the only creditor or representative of a creditor at that meeting. He was there asked to grant an extension of time for the payment of the indebtedness due to the bank. While it is true that the president in his own testimony states that he did not agree to grant the extension, yet by his words and conduct at such meeting he led some of those present to believe that, in behalf of the appellant, he was assenting to the request. Had he not so conducted himself, it stands to reason that the funds

of the company would not have been imperiled by further deposits in that bank. Besides, the president's course of conduct at such time in so falsely misleading the stockholders was quite in keeping with the course thereafter pursued by him and the respondent.

They knew that the company's principal customer paid its bills to the company around the middle of each month. On or about the 10th of the month following the stockholders' meeting, a notation was caused to be made on the ledger card, upon which was kept the company's account, directing that all deposits and checks drawn on the account should be shown to the vice-president. The respondent and its officers did not then reveal to the company and its officers its intentions and actions.

Later, and on July 12th, when the respondent had in its hands the expected funds, it promptly caused a set-off to be made of all the collected funds then in the account. Even then the company and its officers were kept in ignorance of the respondent's actions.

The first knowledge the company had of what the bank had done came on Monday, July 15, 1929.

Upon the facts it is evident that the deposits made from and after the time of the stockholders' meeting were not received by the respondent in the regular and usual course of dealings between it and the company.

The facts in the Bailey case are quite analogous to those here presented, save that in the former case a creditors' committee had been appointed, which fact was known to the bank, whereas in the instant case a meeting of stockholders had been called and held, and what transpired at that meeting was known to the bank.

The Merrimack Bank-Bailey case (*supra*) is authority for most of the petitioner's contentions. It establishes that a transfer and a set-off are one and the same, and are to be dealt with accordingly; that bank creditors are to be treated according to the same rule as are merchandise and other

creditors; that a bank having knowledge of insolvency is affected by the same rule as is any other creditor, and that after such knowledge there can be no "usual course of business."

At page 471, Mr. Justice Anderson, speaking for the court, said:

> ". . . if then the banks had had and had exercised the right of set-off claimed by the present appellant, substantially all of the assets would have been appropriated by the bank creditors, leaving nothing for the general merchandise creditors. A result more obnoxious to the principle of equality, which underlies the Bankruptcy Act, can hardly be imagined."

It is interesting to observe that in the instant case the bank did appropriate $20,476.79, leaving assets worth about $14,000 to be shared *pro rata* by the bank, upon the balance of its claim, with all other creditors—a result exceedingly "obnoxious to the principle of equality."

A State authority also in point is the case of *Putnam* v. *United States Trust Co.*, 223 Mass. 199, opinion by Mr. Chief Justice Rugg. This case holds, briefly, that a bank cannot set off deposits from and after acquiring knowledge of insolvency without creating a preference, and that there is no distinction between a payment and a set-off. This authority, like many others, distinguishes the Massey and Studley cases, hereinafter referred to, and clearly shows that those cases have no application to any phase of law here involved.

Upon the facts and the law, the appellee respectfully submits that the appellant did not have the lawful right on July 12, 1929, to set off the sum of $4027.29, and hence the same is recoverable by the appellee in this proceeding with interest.

(D) *Were the deposits of July 11, 1929, and July 15, 1929, respectively, made and received in the usual course of dealings between the parties?*

Deposits received by a bank after it has knowledge of the insolvency of the depositor, and with the intention of applying the same on account of the indebtedness due by such depositor to the bank, cannot lawfully be appropriated or set off, for that the same are not received in the ordinary and usual course of dealings between the parties; and any attempt on the part of the bank so to do constitutes an unlawful preference.

See *Mechanics' Bank* v. *Ernst*, 231 U.S. 60.
National City Bank v. *Hotchkiss*, 231 U.S. 50.
May v. *Henderson*, 268 U.S. 111.
Continental Nat. Bank v. *Moore* (C.C.A. 9), 299 Fed. 270 (certiorari denied, 266 U.S. 612).
First National Bank of El Centro v. *Harper* (C.C.A. 9), 254 Fed. 641.
Bank of Commerce and Trust Co. v. *Hatcher* (C.C.A. 4), 50 Fed. (2d) 719.
Gates v. *First Nat. Bank of Richmond*, 2 A.B.R. N.S. 507 (D.C.).
Re Fairburn Oil & Fertilizer Co., 240 Fed. 835.
Merrimack Nat. Bank v. *Bailey*, *supra*.
Putnam v. *United States Trust Co.*, *supra*.

The Hotchkiss and Ernst cases (opinions by Mr. Justice Holmes) are of peculiar interest:

In the Hotchkiss case, at page 58: "The bank did not confine its demands to proceeds of the loan, but asked for and obtained securities without regard to their source. It was notified in terms that it was receiving a preference and that the firm was going into bankruptcy. If this was not sufficient notice, it is hard to imagine what would be enough."

In the instant case the respondent herein did the planning for the liquidation, as well as the notifying.

In the Ernst case, at page 67: "The so-called deposit of $54,048.04 was paid in after the cashier had forbidden the payment of checks against the deposit account, and therefore rightly was held to be a payment and a preference. A set off was properly denied."

Here again the facts are somewhat analogous. Under the directions of the vice-president, no checks were paid, except a few small wage checks, and these were paid solely because counsel had said that they would have priority in the liquidation of the bankrupt's affairs. Even all checks of this character, which were presented, were not paid, for most of them were held up and subsequently turned over to the assignee for payment by him out of the funds coming into his possession.

The characterization of the deposits as "the so-called deposit" is particularly applicable to the facts in the case at bar, for, in truth, the moneys which the appellant bank received on July 11th and on July 15th did not assume the aspects of bona-fide deposits, due to the then intentions of the appellant and its officers.

The case of *Continental National Bank* v. *Moore, supra,* did not turn on any point involved in the instant case, yet the reasoning there employed clearly recognizes that, under facts such as here presented, a preference is created.

In the *First National Bank of El Centro* v. *Harper* the petitioner has an outstanding authority in support of his contentions. After distinguishing the facts there, which were analogous to the facts in the case at bar, from the Massey and Studley cases, hereinafter referred to, it held, in substance (p. 86): "That the monies so collected by the bank were deposits created otherwise than in the ordinary relation between a bank and its depositor." There was no fraud or collusion between the bank and its depositor. This case, therefore, clearly stresses the point that fraud or collusion between depositor and bank is not essential to defeat the right of set-off.

The case of *Bank of Commerce and Trust Company* v. *Hatcher, supra,* was decided but a few months ago. There the bankrupt, for whom Hatcher was trustee, had for some while been insolvent and such insolvency was known to the bank. The bankrupt company had undertaken the completion of a road contract which had been started by another. One of the conditions under which the contract was sublet to the bankrupt company by the original contractor was that the moneys received from the contract should be deposited with the appellant bank and that the sub-contractor, the bankrupt, should disburse such funds by checks bearing the signature of the bank's vice-president. At that time the bankrupt was owing the appellant bank a substantial sum of money. Its promises of payment had failed to materialize. On December 2d the bankrupt had no balance to its credit with the appellant. Later on that day, however, the bankrupt's bookkeeper deposited to his company's credit the sum of approximately $8000, received from this road contract, and at the same time submitted to the vice-president of the bank checks in like amount drawn to creditors. The vice-president refused to approve these creditor checks, but did receive the deposit and applied the same on account of the bank's claim. The question involved was whether the deposit was received in the usual course of business. Held, that it was not a deposit received in the usual course of business, but rather a recoverable preference.

In the Gates case (D.C. Va.) the District Judge, delivering his opinion from the bench, at page 511, said:

> "I asked him, myself, that question,—if the company were forced into bankruptcy would it be in a position to deny bankruptcy, by asserting solvency, and he said clearly he had no such idea, that the only way to save it was to keep out of bankruptcy, by the methods suggested."

Again, at page 513:

> "The company was not, it is true, being operated by its creditors' committee, therefore the deposits in the bank were made by the company itself, rather than as in the Merrimac case. But the deposits were after the suspension of operations, and the bank knew this. So I don't think the deposits were made in the ordinary course of business, but, if in due course, I think the bank knew of the practical impossibility of keeping it out of bankruptcy, which fact was well known to everybody. It seems to me, therefore, under the circumstances, that the trustees are entitled to judgment, and I think interest should run from the time the referee declared the first dividend. A decree will be entered accordingly."

Here again we have a case where the facts are quite analogous. The deposits were made by the company itself, and not by a committee. The bankrupt's course of conduct contemplated a suspension of operations. In our case not only did the bank know of the "practical impossibility of keeping it [the company] out of bankruptcy," but intended that an assignment or bankruptcy should occur.

The foregoing are the controlling cases. *New York County National Bank* v. *Massey*, 192 U.S. 138, is not an authority here in point. There it was not shown, as a fact, that the bank intended to apply the deposits until the application was actually made; hence it was held that the deposits were received in regular manner, and, therefore, permitted to be set off.

The case of *Studley* v. *Boylston National Bank*, 229 U.S. 523, is without any authoritative application here, for the reason that knowledge of insolvency, or reasonable cause to believe a preference was being created, was not shown. Besides, the set-off in question constituted the charging up of a note, which was a customary course of dealings between

the parties. Nor is the recent case of *Citizens Nat. Bank* v. *Lineberger,* 45 Fed. (2d) 522 (C.C.A. 4), in point; for there the bank, upon acquiring knowledge of insolvency, set off funds received prior thereto.

Conclusion.

The petitioner herein submits (*a*) that as to the respondent's present contention that the Bankruptcy Court was without jurisdiction, notwithstanding its expressed consent given thereto, such contention is lacking both in legal and moral foundation; and (*b*) that upon the facts of the case and the law applicable thereto, he is entitled to a judgment against the respondent in the sum of $20,476.79, with interest from the date of the filing of his original petition and with costs.

Respectfully submitted,

ROBERT A. B. COOK,
Attorney for Petitioner.

Of Counsel:
Walter J. MacDonald,
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Office Supreme Court, U.S.
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Clerk

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Supreme Court of the United States.

October Term, 1931.

No. 714.

WALTER J. MacDONALD, Trustee in Bankruptcy of Craig, Reed & Emerson, Inc.,
Petitioner,

v.

PLYMOUTH COUNTY TRUST COMPANY,
Respondent.

On Writ of Certiorari to the Circuit Court of Appeals for the First Circuit.

Brief for Petitioner.

ROBERT A. B. COOK,
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Supreme Court of the United States.

OCTOBER TERM, 1931.

No. 714.

WALTER J. MacDONALD, TRUSTEE IN BANKRUPTCY OF CRAIG, REED & EMERSON, INC.,
Petitioner,
v.
PLYMOUTH COUNTY TRUST COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR PETITIONER.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals from which the petition for certiorari was directly prosecuted was rendered November 21, 1931, and appears at 53 F. (2d) 827 (C.C.A. 1) (R. 120-124).

The opinion of the District Judge was rendered January 15, 1931, and appears at 46 F. (2d) 811 (D.C. Mass.) (R. 20-23).

The findings of the Referee in Bankruptcy were made July 29, 1930, and appear at pages 3 to 7 of the record. Upon the findings, according to the printed record, an order

was entered by the Referee on the 29th day of July, 1930 (R. 7). Counsel for both the petitioner and the respondent concur, however, that said date of July 29, 1930, was erroneously printed in the record, and that the true date upon which the order was entered was August 7, 1930. The findings of the Referee and his order are unreported.

Jurisdiction.

The decree of the Circuit Court of Appeals for the First Circuit was entered November 21, 1931. By its decree and in its opinion the said Circuit Court of Appeals ruled that the Referee in Bankruptcy was without jurisdiction, under the Bankruptcy Act, as amended, to hear and determine, in proceedings originating before him, a petition filed by a trustee in bankruptcy for the recovery of property preferentially transferred, even though the respondent had fully consented to the Referee's jurisdiction and had engaged in a trial on the merits before him, and that a decision rendered by the Referee in such proceedings is without binding force upon the respondent.

This decision of the Court is at variance with its own action in the case of *Foster* v. *Manufacturers Finance Company*, 22 F. (2d) 609 (certiorari denied, 276 U.S. 633), and is in direct conflict with the decisions of other Circuit Courts of Appeals—

In re Clarence A. Hopkins (C.C.A. 2), 229 Fed. 378 (certiorari denied, 241 U.S. 669);

American Finance Co. v. *Coppard* (C.C.A. 5), 45 F. (2d) 154;

Board of Education of Salt Lake City v. *Leary* (C.C.A. 8), 236 Fed. 521;

Gamble v. *Daniel* (C.C.A. 8), 39 F. (2d) 447;

Page, Trustee, v. *Arkansas National Gas Corp.* (C.C.A. 8, decided October 5, 1931), 53 F. (2d) 27—

and, moreover, is in conflict with the decisions of this court:

Taubel-Scott v. *Fox,* 264 U.S. 426.
May v. *Henderson,* 268 U.S. 111.
Harrison, Trustee, v. *Chamberlin,* 271 U.S. 191.
Daniel, Trustee, v. *Guaranty Trust Company of New York,* decided March 14, 1932, No. 179 on present docket of U.S. Supreme Court.

The petition for certiorari was granted March 21, 1932.

Statement of Facts.

On or about July 16, 1929, Craig, Reed & Emerson, Inc., for brevity hereinafter referred to as the company, made and executed a general assignment for the benefit of its creditors unto one Loring H. Hall, an officer of the Plymouth County Trust Company, which company for brevity is hereinafter referred to as the respondent (R. 24).

The company had for a number of years prior to its assignment operated and conducted a wholesale shoe business in the city of Brockton. The company's products were sold chiefly to retail chain shoestores. In 1926 the company lost its biggest customer, and from that time onward its operations were conducted at a substantial loss (R. 63). This fact was known to the respondent and its president at the times of the transactions herein complained of (R. 95). The company had been indebted for a period of years to the respondent (R. 93). This indebtedness was represented by negotiable time notes, which, because of the company's inability to pay, were renewed from time to time as they matured (R. 93). But on March 8, 1927, the respondent, regarding the said indebtedness so due it as a frozen loan (R. pp. 73, 93) and knowing that the company was losing money, refused to renew further the loan on time, but insisted upon and received a demand note in the sum of $36,500, which amount was then due it by the company (R. 93). From

March 8, 1927, down to July 12, 1929, a matter of twenty-eight months, no payment was made by the company to the respondent on account of the principal of this loan (R. 72). The president of the respondent knew that it was futile even to ask for payment. He knew the loan could not be paid without wiping out the business. He knew that to insist upon payment meant closing down the business (R. 94, 97, 98, 109), and he also knew that the company was insolvent (R. 97); and so the loan was permitted to run for more than two and a quarter years without any payment whatsoever on the principal.

In June, 1929, and fully three weeks before the time when the company made and executed its assignment for the benefit of creditors, a meeting of the stockholders of the company was held (R. 15). The only person present at the meeting who was not a stockholder or a representative of a stockholder was the president of the respondent. The purpose of the meeting was to determine whether the business should be operated for the few months next succeeding, and, if so, how it could be done with the least possible loss (R. 63).

The president of the respondent testified in these proceedings that he did not agree to an extension until the following October (R. 99). His testimony, however, is at conflict with that of one of the officers of the company (R. 59). At any rate, however, this president did not openly dissent, nor did he so conduct himself at such meeting that those present knew he was not assenting. *All moneys thereafter appropriated or set off by the respondent were deposited by the company subsequent to the time of this meeting.*

The company at that time (June, 1929), and for some while previous thereto, manufactured chiefly for one customer. This customer paid its bills around the middle of each month, a fact which was known to the respondent and certain of its officers (R. 77, 91).

On or about July 10, 1929, the vice-president of the respondent instructed one of his assistants to make a notation on

the ledger card, upon which was kept the company's account, to the effect that all checks on the account and all deposits therein made should be shown to him, the vice-president (R. 69); and, in pursuance of these directions, the assistant so instructed did so call the deposit slips to the attention of that vice-president (R. 69).

The officers of the respondent consulted its counsel on July 12 respecting its right of appropriation or set-off, and, as a part of the advice which it then received, it was told that wage claims had priority in liquidation, consequently [illegible] any wage checks outstanding (R. 109). A [illegible] wage checks, amounting to a negligible total, [illegible] by the respondent, but between July 12, when the first appropriation was made, and July 15, the date of the last appropriation, no other checks of the company were paid by it. Between such dates checks which the company had given to various merchandise creditors were presented, but no official action was taken thereon until after the appropriation of July 13, when all the checks then in possession of the respondent were returned dishonored (R. 45, 46). The respondent refused payment of and returned checks aggregating $6170.94 drawn by the company around July 12 and 13 (R. 102).

Late on the afternoon of July 11, 1929, the company made a deposit with the Campello branch of the respondent in the sum of $15,100.78 (Exhibit 5, R. 112 a). The respondent then acted. At that time it was holding to the credit of the company *collected* funds of $4027.29. This amount was appropriated or set off on July 12, 1929 (Ex. 6, R. 112 b). The *uncollected* funds, including the deposit so made on July 11, 1929, were not immediately appropriated, and for two reasons: (1) If credit were given for uncollected funds, and later the same should for any reason prove uncollectible, the bank "would be out of luck" (R. 76); and (2), as the company customarily paid its help by checks, there were usually wage checks outstanding, and, as these checks would

have priority in liquidation, they therefore should be paid (R. 80). After paying a few of these wage checks, however, the respondent refused to pay more, but turned over such wage checks to the assignee, who made payment thereof out of funds coming to him as such assignee (R. 88).

It was the practice of the respondent at the time of this deposit on July 11, 1929, to send its check deposits through to its correspondent banks for collection by ordinary mail and with a communication, commonly referred to as a transit letter, usually prepared for the respondent by one of its clerks. In this instance, however, the checks comprising the deposit of July 11, 1929, were sent to the correspondent bank in New York with a special letter, by special delivery, dictated by an officer of the respondent, expressing the request that the correspondent notify the respondent immediately by wire whether the said checks were paid upon presentation (R. 37). The respondent had not then notified the company of what it was doing, and what it was contemplating doing (R. 38). Failing to get an answer as early on the 13th of July as was desired, an officer of the respondent telegraphed to its correspondent in New York (R. 40), and, still failing to get an answer as desired, a third communication in the form of a letter was sent, criticizing the correspondent for the delay (R. 40). Later, however, advises were received to the effect that the checks had been paid, and thereupon and on said 13th day of July, 1929, the deposit of $15,100.78 was appropriated. *At no time did this deposit ever appear on the respondent's books as a part of the company's balance with it* (Ex. 6, R. 112 b). Even on July 13, 1929, the company had not been apprised of what the respondent was doing (R. 55). Later that day, however, a letter was addressed by an officer of the respondent to the company, sent by registered mail, and delivered to the company the following Wednesday, July 17, 1929, wherein the respondent advised the company that its loan

had been called. Nothing, however, was then said about the appropriations or set-offs that had been made.

On Monday, July 15, 1929, and two days before the receipt by the company of the registered letter sent it, the vice-president of the respondent called one of the officers of the company by telephone, told him that the loan had been called, and that the respondent had determined that his company was to make an assignment for the benefit of its creditors (R. 55, 56). This was the first knowledge communicated in any way to the company of the plans which the respondent and its officers and counsel had caused to be made in connection with the company's affairs. The officer of the company to whom this communication was delivered stated that he would call at the bank and talk matters over, but would sign no papers, in the absence of his business associate, also an officer of the company, who was then away on a selling trip. The latter, however, was reached by telephone, and the following day, Tuesday, July 16, the two officers of the company, Craig and Reed, repaired to the bank and then and there endeavored to prevail upon the officers of the bank to undo what they had done and to permit the company to go on in business (R. 100). This request was refused and the assignment for the benefit of creditors was executed that afternoon and recorded the next day, the 17th. A sale of the assets of the company was thereafter made by the assignee, and within a day or two following the time of such sale, and on the 28th day of September, 1929, a creditors' petition in bankruptcy was filed, and upon this petition the company was duly adjudicated bankrupt and the petitioner herein was elected trustee. The officer of the respondent who was serving in the capacity of assignee surrendered and delivered to the petitioner the funds in his possession derived from the sale of the company's assets, but he and his principal, the respondent, refused to surrender and deliver unto the petitioner as trustee the funds that the respondent had appropriated and amounting in the

aggregate to $20,476.79 and comprising appropriations made on July 12th, 13th and 15th. Upon such refusal, the petitioner filed a bill in equity with the Referee in Bankruptcy, having charge of the administration of the company's affairs, to recover from the respondent the funds so preferentially received by it. The respondent formally consented to the jurisdiction of the Referee, and the cause was thereupon heard at length on the merits before such Referee. The Referee made a finding against the respondent, who thereupon took a review to the District Judge.

At the hearing before the latter, and for the first time and notwithstanding its formal consent and its engaging in a hearing on the merits before the Referee, the respondent questioned the jurisdiction of the Referee. The District Judge overruled this contention of the respondent, and, after arguments on both the facts and the law, and after consideration thereof, entered a decree in favor of the petitioner herein. From this decree an appeal was taken to the Circuit Court of Appeals for the First Circuit, and that court, without in any wise passing upon the merits, held in substance that, irrespective of the respondent's formal consent and irrespective of its going to trial on the merits before the Referee and its peculiar relation to the assets of the estate, the Referee was without jurisdiction to hear the suit, and that jurisdiction could not be conferred upon him.

Schedule of Important Dates.

March 8, 1927, the respondent refused to renew on time the then maturing loan of Craig, Reed & Emerson, Inc., and insisted and received a renewal note payable on demand. The respondent through its officers regarded the loan as a "frozen" one, and also regarded the company as "insolvent."

June, 1929, an informal meeting of the stockholders of Craig, Reed & Emerson, Inc., was held for the purpose of

determining whether the business could be carried along for another three months, and, if so, how it could be conducted at the least possible loss. The only person present at the meeting other than stockholders, or representatives of stockholders, was the president of the respondent company (day and date of meeting not determined, but according to testimony such meeting occurred about three weeks before the assignment for creditors).

July 10, 1929, the respondent caused a notation to be made on the ledger card upon which the account of Craig, Reed & Emerson, Inc., was kept: "show all checks & deposits to Mr. Crocker" (respondent's vice-president).

July 11, 1929, Craig, Reed & Emerson, Inc., deposited with the respondent four checks drawn on a New York bank or banks aggregating $15,100.78.

July 12, 1929, the respondent transmitted said checks with a special letter to National City Bank, requesting the latter to "collect the same, placing credit to our account and advising us immediately by wire."

July 12, 1929, the respondent appropriated without notice at the time to the company all collected funds, amounting to $4027.29, then standing to the credit of the company with the respondent. The respondent consulted counsel with respect to appropriations, and the respondent, without notice to the company, directed that an assignment for the benefit of creditors be drawn for the company's execution, the assignee being an officer of the respondent.

July 13, 1929, telegram by respondent to National City Bank, inquiring fate of checks aggregating "fifteen thousand odd."

July 13, 1929, letter from respondent to National City Bank supplementing telegram.

July 13, 1929, letter from respondent to Craig, Reed & Emerson, Inc., advising it that respondent was "calling this note for payment as of this date, Saturday, July 13." This

letter was sent by registered mail and was not delivered until July 17.

July 15, 1929; on the morning of this day the respondent by its vice-president called one of the officers of Craig, Reed & Emerson, Inc., and informed him that the bank had called its loan and that the officers of Craig, Reed & Emerson, Inc., should come up to the bank at once and execute the assignment for creditors that had been drawn.

July 16, 1929, Craig, Reed & Emerson, Inc., assigned for the benefit of its creditors to Loring H. Hall, an officer of the respondent company.

July 17, 1929, the assignment for the benefit of creditors was duly recorded.

September 27, 1929, the assignee sold and disposed of all assets to one Hogan, acting as agent for Craig, Reed and other stockholders.

September 28, 1929, an involuntary petition in bankruptcy was filed in the District Court of the United States for the District of Massachusetts by certain creditors for the adjudication of Craig, Reed & Emerson, Inc., as a bankrupt.

October 14, 1929, adjudication made.

November 27, 1929, Walter J. MacDonald of Brockton appointed trustee.

April 14, 1930, trustee's amended bill of complaint filed with the Referee in Bankruptcy, after counsel for the proposed defendant had consented to Referee's jurisdiction.

April 30, 1930, hearing before the Referee on merits.

August 7, 1930, Referee's order.

August 11, 1930, the respondent filed its petition for a review of Referee's order.

August 15, 1930, the trustee filed his petition for a review of Referee's order.

November 5, 1930, certificate of the Referee recommitted by order of District Judge.

November 20, 1930, Referee filed amended certificate.

January 15, 1931, opinion and decree of District Judge awarding judgment in favor of the petitioner in the sum of $20,476.79, with interest from December 5, 1929.

January 29, 1931, respondent filed its appeal petition along with assignment of errors, which appeal was promptly allowed.

October 13, 1931, hearing before Circuit Court of Appeals for the First Circuit.

November 21, 1931, opinion and decree of Circuit Court of Appeals.

February 19, 1932, trustee's petition for a writ of certiorari filed with the United States Supreme Court.

March 21, 1932, certiorari granted.

Specification of Errors.

The petitioner claims that the Circuit Court of Appeals for the First Circuit erred—

1. In holding that the Referee in Bankruptcy was without jurisdiction in the instant case.

2. In failing or refusing to adjudicate the issues on their merits.

Questions Presented.

1. Did the parties by their consent, expressed in open court, and by proceeding to trial upon the merits, confer jurisdiction upon the court below to hear and determine the issues involved?

2. Were the several appropriations made by the respondent on July 12, 13 and 15, 1929, preferential transfers within the purview of the Bankruptcy Act as amended?

a. Was the company insolvent when and at the times of the appropriations or set-offs complained of?

b. Did the respondent at such times of appropriations or set-offs have reasonable cause to believe that preferences would be effected thereby?

c. Were the funds on deposit with the respondent on July 12, 1929, received in such manner as to enable it lawfully to apply such funds by way of appropriations or set-offs against indebtedness due it by the company?

d. Were the deposits of July 11, 1929, and July 15, 1929, respectively, made and received in the usual course of dealings between the parties and in such manner as to enable the respondent lawfully to appropriate such deposits and to set them off against indebtedness then due and owing it by the company?

Statutes Involved.

Bankruptcy Act of 1898 as amended:

Section 1. (7) "'court' shall mean the court of bankruptcy in which the proceedings are pending, and may include the referee."

Section 1. (8) "'courts of bankruptcy' shall include the district courts of the United States and of the Territories and possessions to which this Act is or may hereafter be applicable, the supreme court of the District of Columbia, and the United States court of Alaska."

Section 23. (b) "Suits by the trustee shall be brought or prosecuted only in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, except suits for the recovery of property under section sixty, subdivision b; section sixty-seven, subdivision e; and section seventy, subdivision e."

Section 38. (a) (4) "Referees respectively are hereby invested, subject always to a review by the judge within the limits of their districts as established from time to time, with jurisdiction to perform such part of the duties, except as to questions arising out of the applications of bankrupts for composition or discharges, as are by this act conferred on courts of bankruptcy and as shall be prescribed by rules or

orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided."

Section 60. (b) "If a bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment, or of the recording or registering of the transfer if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and the judgment or transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person. And for the purpose of such recovery any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

Summary of Argument.

The petitioner's bill in equity was in the form of a plenary suit. The trial thereupon proceeded according to the rules of evidence obtaining in a plenary action. The consent given by the respondent was sufficiently adequate and complete to enable the Referee to hear and determine the issues. The respondent was in no wise harmed by proceeding as it did. See—

Taubel-Scott v. *Fox*, 264 U.S. 426, 433, 434.

See also—

May v. *Henderson*, 268 U.S. 111.
Harrison, Trustee, v. *Chamberlin*, 271 U.S. 191.

Daniel, Trustee, v. *Guaranty Trust Company of New York,* decided March 14, 1932, No. 179 on present docket of U.S. Supreme Court.

As this litigation has already covered a considerable period of time, and as counsel have united in presenting to this court all questions that arise upon the record, it is desirable that this court completely decide all issues, even though the Circuit Court of Appeals for the First Circuit apparently did not consider the merits.

Cole v. *Ralph,* 252 U.S. 286, 289, 290.

Upon the facts it definitely appears that the company was insolvent; that the respondent not only had reasonable cause to believe it insolvent, but actually knew of the company's insolvency, and knew or had reasonable cause to believe that the moneys it was appropriating would prefer it over other creditors of a like class. It was the respondent, and not the company, who first determined that the company should make and execute an assignment for the benefit of creditors, thereby committing an act of bankruptcy. The respondent knew that the company could not continue in business after the respondent had made the appropriations of its bank deposits and balance as the respondent contemplated doing.

The respondent has at no time questioned the right of the Referee to exercise summary jurisdiction in compelling one of its officers, who was the assignee for the benefit of creditors, to turn over the property which had been assigned to him; and it expressly consented to the Referee's exercising the power to hear and determine the trustee's bill for the recovery of the moneys so appropriated by the respondent.

Hence the petitioner submits that he is entitled to recover in these proceedings.

ARGUMENT.

I.

Did the parties by their consent, expressed in open court, and by proceeding to trial upon the merits, confer jurisdiction upon the court below to hear and determine the issues involved?

It will be well first to consider the organic law. Under the caption "Jurisdiction of United States and State Courts," section 23 (b) of the Bankruptcy Act, as it was originally enacted, provided as follows: "Suits by the trustee shall be brought or prosecuted only in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant." And thereafter, in 1903, and again in 1910, Congress enacted certain amendments to the law for the purpose of giving greater definiteness to various of its provisions and for the enlargement of the scope of the law. To section 23 (b) were added the following words: "except suits for the recovery of property under Section 60, subdivision b; section sixty-seven, subdivision e; and section seventy, subdivision e." And to section 60 (b), under the caption "Preferred Creditors," and having to do with the recovery of property preferentially transferred, there was added by way of amendment the following: "And for the purpose of such recovery any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction." There have been no material changes since made in these sections.

When we pause and consider these amendments, it becomes convincingly clear that it was the intention of Congress that courts having to do with the administration of bankruptcy cases should, so far as might be practicable, be vested with jurisdiction over all matters arising in such

cases. Prior to the amendments of 1903 and 1910 there was but one class of cases which a trustee in bankruptcy could, as a matter of right under section 23 (b), institute in courts administering bankruptcy; and, with these amendments, another class was added. But at all times, both before 1903 and since, such courts have always, and with the consent of the proposed defendant, had jurisdiction over all matters and controversies arising in bankruptcy.

Jurisdiction by consent is in no wise limited or restricted by the amendment of 1903 made to section 60 (b). That amendment was merely to conform with the amendment to section 23 (b), which latter section was being enlarged in its scope and operation. Congress did not by these amendments disturb the consent provision of section 23 (b).

The right of the Referee to hear a petition such as was filed in the instant case was decided by this court in the case of *Taubel-Scott* v. *Fox*, 264 U.S. 426. At page 431 the court said:

> "But Congress did not, either by § 2, § 23 of the Bankruptcy Act of 1898 or any other provision of the act, confer generally such broad jurisdiction over claims by a trustee against third persons. Nor has it provided, in terms, that a substantial adverse claim to property which is not in the possession of the bankruptcy court and which is demanded by the trustee under subdivision f of § 67, may be litigated, without consent, by a summary proceeding."

And again, at pages 433, 434:

> "Wherever the bankruptcy court had possession it could, under the Act of 1898, as originally enacted, and can now, determine in a summary proceeding controversies involving substantial adverse claims of title under subdivision e of § 67, under subdivision b of § 60 and under subdivision e of § 70. But in no case where it

lacked possession, could the bankruptcy court, under the law as originally enacted, nor can it now (without consent) adjudicate in a summary proceeding the validity of a substantial adverse claim. In the absence of possession, there was under the Bankruptcy Act of 1898, as originally passed, no jurisdiction, without consent, to adjudicate the controversy even by a plenary suit. The Act of February 5, 1903, c. 487, § 8, 32 Stat. 797, 798, 800, together with the Act of June 25, 1910 c. 412, § 7, 36 Stat. 838, 840, conferred upon the bankruptcy court jurisdiction, under certain circumstances, against the adverse claimant, in a plenary suit under § 60, subdivision b, § 67, subdivision e, and § 70, subdivision e."

And prior to the foregoing decision, this court, speaking through Mr. Chief Justice Fuller in the case of *Mueller* v. *Nugent,* 184 U.S. 1, at page 13, said:

"We think the referee has the power to act in the first instance in matters such as this, when the case has been referred, and in aid of the court of bankruptcy, and exercises in such cases 'much of the judicial authority of that court'. *White* v. *Schloerb,* 178 U.S. 542. By petition for review the matter can be carried to the bankruptcy court and the entire record and findings laid before that tribunal as was done here."

The facts in that case were substantially these: Following an adjudication and a reference to the Referee in Bankruptcy, the latter, upon a summary petition filed before him, entered an order requiring Nugent, an agent of the bankrupt, to show cause why he should not surrender up and deliver unto the trustee certain property which he, the said agent, was then holding. The real question in the case, said the court, in substance, was whether the Referee's order directing the surrender of the property was lawful,

and that in turn raised the question of the validity of the show cause order.

At page 14:

> "Has the bankruptcy court the power to compel the bankrupt, or his agent, to deliver up money or other assets of the bankrupt, in his possession or that of some one for him, on petition and rule to show cause? . . .
>
> "The bankruptcy court would be helpless indeed if the bare refusal to turn over could conclusively operate to drive the trustee to an action to recover as for an indebtedness", etc.

It will be observed that in the case of *Mueller* v. *Nugent* this court very definitely refers to the Referee, not once, but several times, as the "bankruptcy court," and according to the law he is, in given circumstances, the Bankruptcy Court. See sections 1 (7), 1 (8) and 38 (4), all hereinbefore quoted at length. The term "court" as defined in section 1 (7) is more comprehensive than the term "court of bankruptcy" as defined in section 1 (8).

To like effect see—

Taubel-Scott v. *Fox*, 264 U.S. 426.
May v. *Henderson*, 268 U.S. 111.
Harrison, Trustee, v. *Chamberlin*, 271 U.S. 191.

The decision of the Circuit Court of Appeals of the First Circuit in the instant case is utterly in conflict with the disposition made by it of the case of *Foster* v. *Manufacturers' Finance Company*, 22 F. (2d) 609 (certiorari denied, 276 U.S. 633), wherein a petition for the recovery of a preferential transfer was filed with and heard by Mr. Referee Young with the consent of both parties. It was the Referee who raised the jurisdictional question and disposed of it in these words:

> "Admitting the Manufacturers' Finance Company

to be an adverse claimant not within the summary jurisdiction of the court under ordinary circumstances, it is clear that in this particular case that company has consented to the jurisdiction. Harrison, Trustee, v. Chamberlin, 271 U. S. 191."

This case was later heard before one of our District Judges, and still later was heard and decided by the Circuit Court of Appeals, from whose decision certiorari was sought and denied by this court. Obviously the Referee's conclusion of law was accepted, for, notwithstanding the fact that the record clearly disclosed that the parties were before the court seeking summary jurisdiction against an adverse claimant who had consented thereto, nevertheless neither the District Court nor the Circuit Court of Appeals questioned its jurisdictional right to hear and determine the cause.

By other Circuit Courts of Appeals we have the following decisions in support of our contention:

In re Hopkins (C.C.A. 2), 229 Fed. 378, at page 380:

"The question was presented to the Trustee whether he would proceed summarily or by plenary suit and he elected the former without objection by the bankrupt, his wife or any one else. Having proceeded without objection, we think it is too late now to present a question which is addressed solely to the form of the proceeding. If the objection had been made at the time the Trustee was required to elect, it is quite possible that the petitioner's contention would have been sustained. But she, apparently, acquiesced in the summary proceedings as the most satisfactory way of disposing of the question and we are of the opinion that it is too late to present the question on this review by an Appellate Court."

American Finance Co. v. *Coppard* (C.C.A. 5), 45 F. (2d) 154, at page 155:

> "if the [adverse] claim is found to be real and substantial, the court must decline to determine the merits and dismiss the summary proceeding, unless the adverse claimant has consented to the proceeding."

Whitney v. *Barrett* (C.C.A. 5), 28 F. (2d) 760, at page 761:

> "This was a summary proceeding. In such a proceeding the bankruptcy court is without jurisdiction to determine a controversy in reference to property adversely held without the consent of the adverse claimant."

Board of Education of Salt Lake City v. *Leary* (C.C.A. 8), 236 Fed. 521, there held that the court could proceed summarily to adjudicate the matter only by consent.

In the case of *Gamble* v. *Daniel* (C.C.A. 8, 1930), 39 F. (2d) 447, occur one of the latest pronouncements on the subject. At page 453:

> "If such possession be in the bankrupt the court of bankruptcy has jurisdiction by summary proceedings to adjudicate the rights of the parties; while, if such possession is elsewhere, the adjudication must be by plenary suit in the proper federal or state court, if the claimant objects to a summary proceeding in the bankruptcy court. This rule has been so often announced that it is necessary to cite only the latest cases."

See cases there cited.

Another comparatively recent case is that of *In re White Satin Mills* (D.C. Minn.), 25 F. (2d) 313, at page 314:

> "It is well settled that a court of bankruptcy is without jurisdiction to adjudicate in a summary proceeding

a controversy in reference to property held adversely to the bankrupt estate without the consent of the adverse claimant."

This case cites *In re Friedman Bros.*, 19 F. (2d) 243, 244.

There is not a single reported case that we have been able to find which, under the bankruptcy law as now amended, fails to hold that adequate jurisdiction over an adverse claimant is not acquired if he consents thereto.

The principles hereinbefore enunciated are not to be confused with the premise that a trustee can implead before a Referee in Bankrutpcy an adverse claimant without his consent. This latter premise is obviously unsound. See—

Weidhorn v. *Levy*, 253 U.S. 268:

There a suit was brought, plenary in character, before a Referee in Bankruptcy for the purpose of setting aside a transfer of property as provided in section 70 (e). The respondent in the suit never consented to jurisdiction, nor had he in any wise invested jurisdiction in the court, but at all times objected to the latter's exercising jurisdiction over the case. In line with its earlier decisions, this court there held that the trustee in bankruptcy could not, without the consent of the adverse claimant, implead him before a Referee in Bankruptcy.

There are many authoritative cases holding to like effect that substantial adverse claimants cannot, upon petition and without consent, be impleaded in a summary proceeding, but these cases are not here in point.

It will also be borne in mind that in the instant case the respondent not only appropriated the bankrupt's balance and certain deposits as previously stated, but, moreover, and immediately thereafter, obliged the bankrupt company to assign all its property to an officer of the respondent herein. As to the property so assigned, neither the respondent nor its officers or the assignee raised any question

whatsoever about the summary jurisdiction of the court, but surrendered all such property or the proceeds thereof to the court. As to the bankrupt's balance and deposits that had been appropriated by it, the respondent set up claims of adverse ownership. As will be seen from the authorities hereinbefore cited, it was well within the power of the Referee to determine whether the respondent's claims were merely colorable in character, or, on the other hand, were made in good faith and were substantial. If they were merely colorable, the Referee was well empowered to act.

Mueller v. *Nugent, supra.*

II.

Were the several appropriations made by the respondent on July 12, 13 and 15, 1929, preferential transfers within the purview of the Bankruptcy Act as amended?

Before proceeding with our argument upon the facts, it is well to observe that counsel are united in presenting to this court all questions arising upon the record, and as this litigation already has covered a considerable period of time, it is desirable that this court proceed with a complete decision of the case. See—

Cole v. *Ralph,* 252 U.S. 286, 289, 290.

A. Was the company insolvent when and at the times of the appropriations or set-offs complained of?

Hall, who was the assignee under the assignment for the benefit of creditors and an officer of the respondent, testified that the assets of the above company had been sold by him for $14,330.01, which amount represented the fair value of all the assets of the company both as of the time of the assignment and of the time of the sale, and also as of the times of the said set-offs or appropriations, which were

within four days of the assignment; and that the liabilities of the said company at such times were $58,016.36.

The president of the respondent testified that he regarded the company as insolvent (R. 97) as of said times; hence, upon the admission of the respondent, the company was insolvent as of the times complained of.

B. Did the respondent at such times of appropriations or set-offs have reasonable cause to believe that preferences would be effected thereby?

There can be no controverted issue under this question, for the respondent, by one or more of its officers, who had charge of the transactions between it and the company, had knowledge of the insolvency of the company as of the times complained of and therefore not only had reasonable cause to believe, but actually had knowledge, that the appropriations or set-offs made by it would operate to give it a larger percentage of its indebtedness than would be received by other creditors of the company of the same class.

The president of the respondent testified before the Referee that he knew that it was futile even to ask the company for payment—he knew that the loan could not be paid without wiping out the business. He knew that to insist upon payment meant closing down the business (R. pp. 94, 98), and he also knew that the company was insolvent. Substantially the same knowledge was possessed by Crocker, the vice-president. He knew the loan was a "frozen" one and could not be collected. Consequently, and in the light of the knowledge possessed by it, the respondent not only had reasonable cause to believe that the appropriations or set-offs made by it would operate to give it a larger percentage of its indebtedness than would be received by other creditors of the same class, but actually knew that such would be the result. The outstanding authority governing this principle of law is the case of *Merrimack Nat. Bank* v. *Hollis R. Bailey et al.*, decided by the Circuit Court of Ap-

peals for the First Circuit and reported in 289 Fed. 468 (certiorari denied, 263 U.S. 704).

C. Were the funds on deposit with the respondent on July 12, 1929, received in such manner as to enable it lawfully to apply such funds by way of appropriations or set-offs against indebtedness due it by the company?

> "Bank creditors are subject to exactly the same rule of law as to preferences and set-offs as are merchandise and other creditors."
>
> *Merrimack Nat. Bank* v. *Hollis R. Bailey et al.* (C.C.A. 1), 289 Fed. 468, 470.

The collected funds of $4027.29 represented deposits made with the respondent by the company subsequent to the time of a certain stockholders' meeting held some three weeks prior to July 12, 1929, the date of the first appropriation or set-off.

The president of the respondent was the only creditor or representative of a creditor at that meeting. He was there asked to grant an extension of time for the payment of the indebtedness due to the bank. While it is true that the president in his testimony states that he did not agree to grant the extension, yet by his words and conduct at such meeting he led some of those present to believe that, in behalf of the respondent, he was assenting to the request. Had he not so conducted himself, it stands to reason that the funds of the company would not have been imperiled by further deposits in that bank. Besides, the president's course of conduct at such time in so falsely misleading the stockholders was quite in keeping with the course thereafter pursued by him and the respondent.

They knew that the company's principal customer paid its bills to the company around the middle of each month. On or about the 10th of the month following the stockholders'

meeting, a notation was caused to be made on the ledger card, upon which was kept the company's account, directing that all deposits and checks drawn on the account should be shown to the vice-president. The respondent and its officers did not then reveal to the company and its officers its intentions and actions.

Later, and on July 12, when the respondent had in its hands the expected funds, it promptly caused a set-off to be made of all the collected funds then in the account. Even then the company and its officers were kept in ignorance of the respondent's actions.

The first knowledge the company had of what the bank had done came on Monday, July 15, 1929.

Upon the facts it is evident that the deposits made from and after the time of the stockholders' meeting were not received by the respondent in the regular and usual course of dealings between it and the company.

The facts in the Bailey case are quite analogous to those here presented, save that in the former case a creditors' committee had been appointed, which fact was known to the bank, whereas in the instant case a meeting of stockholders had been called and held, and what transpired at that meeting was known to the bank.

The Bailey case is authority for most of the petitioner's contentions. It establishes that a transfer and a set-off are one and the same, and are to be dealt with accordingly; that bank creditors are to be treated according to the same rule as are merchandise and other creditors; that a bank having knowledge of insolvency is affected by the same rule as is any other creditor, and that after such knowledge there can be no "usual course of business."

At page 471 Mr. Justice Anderson, speaking for the court, said:

> ". . . if then the banks had had and had exercised the right of set-off claimed by the present appellant,

substantially all of the assets would have been appropriated by the bank creditors, leaving nothing for the general merchandise creditors. A result more obnoxious to the principle of equality, which underlies the Bankruptcy Act, can hardly be imagined."

It is interesting to observe that in the instant case the bank did appropriate $20,476.79, leaving assets worth about $14,000 to be shared *pro rata* by the bank, upon the balance of its claim, with all other creditors—a result exceedingly "obnoxious to the principle of equality."

A State authority also in point is the case of *Putnam* v. *United States Trust Co.*, 223 Mass. 199, opinion by Mr. Chief Justice Rugg. This case holds, briefly, that a bank cannot set off deposits from and after acquiring knowledge of insolvency without creating a preference, and that there is no distinction between a payment and a set-off. This authority, like many others, distinguishes the Massey and Studley cases, hereinafter referred to, and clearly shows that those cases have no application to any phase of law here involved.

Upon the facts and the law, the petitioner respectfully submits that the respondent did not have the lawful right on July 12, 1929, to set off the sum of $4027.29, and hence the same is recoverable by the petitioner in this proceeding with interest.

D. Were the deposits of July 11, 1929, and July 15, 1929, respectively, made and received in the usual course of dealings between the parties and in such manner as to enable the respondent lawfully to appropriate such deposits and to set them off against indebtedness then due and owing it by the company?

Deposits received by a bank after it has knowledge of the insolvency of the depositor, and with the intention of applying the same on account of the indebtedness due by such depositor to the bank, cannot lawfully be appropriated or

set off, for that the same are not received in the ordinary and usual course of dealings between the parties; and any attempt on the part of the bank so to do constitutes an unlawful preference.

See *Mechanics' Bank* v. *Ernst*, 231 U.S. 60.
National City Bank v. *Hotchkiss*, 231 U.S. 50.
May v. *Henderson*, 268 U.S. 111.
Continental Nat. Bank v. *Moore* (C.C.A. 9), 299 Fed. 270 (certiorari denied, 266 U.S. 612).
First Nat. Bank of El Centro v. *Harper* (C.C.A. 9), 254 Fed. 641.
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Gates v. *First Nat. Bank of Richmond*, 2 A.B.R. (N.S.) 507 (D.C.).
Re Fairburn Oil & Fertilizer Co., 240 Fed. 835
Merrimack Nat. Bank v. *Bailey*, *supra*.
Putnam v. *United States Trust Co.*, *supra*.

The Hotchkiss and Ernst cases (opinions by Mr. Justice Holmes) are of peculiar interest:

In the Hotchkiss case, at page 58:

> "The bank did not confine its demand to proceeds of the loan, but asked for and obtained securities without regard to their source. It was notified in terms that it was receiving a preference and that the firm was going into bankruptcy. If this was not sufficient notice, it is hard to imagine what would be enough."

In the instant case the respondent did the planning for the liquidation, as well as the notifying.

In the Ernst case, at page 67:

> "The so-called deposit of $54,048.08 was paid in after the cashier had forbidden the payment of checks against

the deposit account, and therefore rightly was held to be a payment and a preference. A set-off properly was denied."

Here again the facts are somewhat analogous. Under the directions of the vice-president, no checks were paid, except a few small wage checks, and these were paid solely because counsel had said that they would have priority in the liquidation of the bankrupt's affairs. Even all checks of this character, which were presented, were not paid, for most of them were held up and subsequently turned over to the assignee for payment by him out of the funds coming into his possession.

The characterization of the deposits as "the so-called deposit" is particularly applicable to the facts in the case at bar, for, in truth, the moneys which the respondent bank received on July 11 and on July 15 did not assume the aspects of *bona fide* deposits, due to the then intentions of the respondent and its officers.

The case of *Continental National Bank* v. *Moore, supra,* did not turn on any point involved in the instant case, yet the reasoning there employed clearly recognizes that, under facts such as here presented, a preference is created.

In the *First National Bank of El Centro* v. *Harper* the petitioner has an outstanding authority in support of his contentions. After distinguishing the facts there, which were analogous to the facts in the case at bar, from the Massey and Studley cases, hereinafter referred to, it held, in substance (p. 86): "That the monies so collected by the bank were deposits created otherwise than in the ordinary relation between a bank and its depositor." There was no fraud or collusion between the bank and its depositor. This case, therefore, clearly stresses the point that fraud or collusion between depositor and bank is not essential to defeat the right of set-off.

The case of *Bank of Commerce and Trust Company* v. *Hatcher, supra,* was decided but a short while ago. There the bankrupt for whom Hatcher was trustee had for some while been insolvent and such insolvency was known to the bank. The bankrupt company had undertaken the completion of a road contract which had been started by another. One of the conditions under which the contract was sublet to the bankrupt company by the original contractor was that the moneys received from the contract should be deposited with the appellant bank and that the sub-contractor, the bankrupt, should disburse such funds by checks bearing the signature of the bank's vice-president. At that time the bankrupt was owing the appellant bank a substantial sum of money. Its promises of payment had failed to materialize. On December 2 the bankrupt had no balance to its credit with the appellant. Later on that day, however, the bankrupt's bookkeeper deposited to his company's credit the sum of approximately $8000, received from this road contract, and at the same time submitted to the vice-president of the bank checks in like amount drawn to creditors. The vice-president refused to approve these creditor checks, but did receive the deposit and applied the same on account of the bank's claim. The question involved was, Whether the deposit was received in the usual course of business? Held, that it was not a deposit received in the usual course of business, but rather was a recoverable preference.

In the Gates case (D.C. Va.) the District Judge, delivering his opinion from the bench, at page 511, said:

> "I asked him, myself, that question,—if the company were forced into bankruptcy would it be in a position to deny bankruptcy, by asserting solvency, and he said clearly he had no such idea, that the only way to save it was to keep out of bankruptcy, by the methods suggested."

Again, at page 513:

> "The company was not, it is true, being operated by its creditors' committee, therefore the deposits in the bank were made by the company itself, rather than as in the Merrimac case. But the deposits were after the suspension of operations, and the bank knew this. So I don't think the deposits were made in the ordinary course of business, but, if in due course, I think the bank knew of the practical impossibility of keeping it out of bankruptcy, which fact was well known to everybody. It seems to me, therefore, under the circumstances, that the trusteees are entitled to judgment, and I think interest should run from the time the referee declared the first dividend. A decree will be entered accordingly."

Here again we have a case where the facts are quite analogous. The deposits were made by the company itself, and not by a committee. The bankrupt's course of conduct contemplated a suspension of operations. In our case not only did the bank know of the "practical impossibility of keeping it [the company] out of bankruptcy," but intended that an assignment or bankruptcy should occur.

The foregoing are the controlling cases.

New York County National Bank v. *Massey*, 192 U.S. 138, is not an authority here in point. There it was not shown, as a fact, that the bank intended to apply the deposits until the application was actually made; hence it was held that the deposits were received in regular manner, and, therefore, permitted to be set off.

The case of *Studley* v. *Boylston Nat. Bank*, 229 U.S. 523, is without any authoritative application here, for the reason that knowledge of insolvency, or reasonable cause to believe a preference was being created, was not shown. Besides, the set-off in question constituted the charging up of a note,

which was a customary course of dealings between the parties. Nor is the recent case of *Citizens Nat. Bank* v. *Lineberger*, 45 F. (2d) 522 (4 C.C.A.), in point; for there the bank, after acquiring knowledge of insolvency, set off funds then in its possession against the debt due it.

We know of no more apt words for the characterization of the respondent's conduct than those employed by this court in the case of *May* v. *Henderson*, 268 U.S. 111, 119:

> "At most it was a clumsy, ineffectual and fraudulent effort to divert the funds of the bankrupt."

Conclusion.

The petitioner herein submits (*a*) that, as to the respondent's present contention that the Bankruptcy Court was without jurisdiction, notwithstanding its expressed consent given thereto, such contention is lacking both in legal and moral foundation; and (*b*) that, upon the facts of the case and the law applicable thereto, he is entitled to a judgment against the respondent in the sum of $20,476.79, with interest from the date of the filing of his original petition and with costs.

Respectfully submitted,

ROBERT A. B. COOK,
Attorney for Petitioner.

Of Counsel:
Walter J. MacDonald,
Jonathan B. Rintels.

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Supreme Court of the United States

OCTOBER TERM, 1931.

No. 714

WALTER J. MacDONALD, Trustee in Bankruptcy of Craig, Reed & Emerson, Inc.,
Petitioner Herein,

v.

PLYMOUTH COUNTY TRUST COMPANY,
Respondent Herein.

In the Matter of CRAIG, REED & EMERSON, INC., Bankrupt.

BRIEF OF RESPONDENT, PLYMOUTH COUNTY TRUST COMPANY.

JOSEPH B. JACOBS,
Attorney for Respondent.

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HERBERT C. THORNDIKE,
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LAWYERS' BRIEF & PUBLISHING CO.
BOSTON, MASS.

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v.

PLYMOUTH COUNTY TRUST COMPANY;
Respondent Herein.

In the Matter of CRAIG, REED & EMERSON, INC., Bankrupt.

BRIEF FOR THE RESPONDENT, PLYMOUTH COUNTY TRUST COMPANY.

Statement of Facts.

Craig, Reed & Emerson, Inc., was a Massachusetts corporation engaged in manufacturing shoes at Brockton, Massachusetts.

The Plymouth County Trust Company is a banking institution doing business in Brockton.

Craig, Reed & Emerson, Inc., owed $36,500 for some time to the Plymouth County Trust Company. (Rec., p. 83.) On March 8, 1927, the loan was changed from a time loan to a demand loan. (Rec., p. 83.)

Craig, Reed & Emerson, Inc., had its checking account at the Plymouth County Trust Company, and made its deposits there.

In June, 1929, Mr. Cooper, the president of the Plymouth County Trust Company, was asked to come over to the Plymouth Development Company, the office of a Mr. Davis, a preferred stockholder of Craig, Reed & Emerson, Inc. When Mr. Cooper arrived at the office of the Development Company, Messrs. Reed, Field and Craig, officers of Craig, Reed & Emerson, Inc., were there, as were the directors of the Plymouth Development Company.

Mr. Davis said that "the object of the meeting was to determine the best way to continue the business of Craig, Reed & Emerson, Inc., for the next few months at the smallest possible loss." (Rec., p. 58.)

Mr. Cooper, although present, did not speak (Rec., pp. 58, 59), and did not agree to anything. (Rec., p. 85.)

Subsequent to this conference, the business of Craig, Reed & Emerson, Inc., was conducted as usual, and deposits were made in the usual course of business by Craig, Reed & Emerson, Inc., in the Plymouth County Trust Company. (Rec., pp. 50, 51, 82.)

On July 11, 1929, Craig, Reed & Emerson, Inc., deposited in the Campello Branch of the Plymouth County Trust Company $15,100.78 in the form of checks drawn on New York. (Rec., pp. 35, 45; Exhibit 5, p. 101.)

Either on the same day, or on the morning of the 12th of July, the checks arrived at the main office of the bank. (Rec., p. 45.)

On the 12th day of July, 1929, there was on deposit in the Plymouth County Trust Company to the account of Craig, Reed & Emerson, Inc., $5140.87 collected funds (Rec., p. 69), and the uncollected checks of $15,100.78 drawn on New York.

On July 12, 1929, after the $15,100.78 checks arrived at the main office of the bank, the bank offset $4027.29 and $15,100.78, and made proper entries on July 12, 1929, showing the offset of $4027.29, but did not make the offsetting entries of the $15,100.78 checks until July 13th, when the checks had cleared. (Exhibit 6, p. 103; Rec., pp. 45, 69, 81.)

On July 12, 1929, $375 was also charged against Craig, Reed & Emerson, Inc., for rent due July 1st. (Rec., pp. 43, 44, 47, 48, 73.)

On July 15, 1929, $1348.72 was set-off by the bank, which was the amount of the balance remaining in the bank from July 12th in collected funds, plus uncollected checks of $347.76 and $316.56 deposited on July 15th. (Rec., pp. 41, 42.)

On July 16, 1929, Craig, Reed & Emerson, Inc., made a general assignment for the benefit of its creditors to L. H. Hall, assistant treasurer of the Plymouth County Trust Company (Rec., p. 25), and on the 28th day of September, 1929, an involuntary petition in bankruptcy was filed against Craig, Reed & Emerson, Inc. The company was adjudicated bankrupt on the 14th day of October, 1929, and subsequently Walter J. MacDonald was appointed trustee. (Rec., p. 1.)

The trustee filed a petition with the referee in bankruptcy to have the Trust Company turn over to him $20,476.79, claiming the same to be preferences. (Rec., p. 2.)

The Trust Company consented to the jurisdiction of the Referee, with the understanding that it was to be tried as a plenary suit. (Rec., pp. 24, 115.)

The Referee decided (Rec., pp. 6, 7) that the Trust Company had the right to set-off the rent of $375 and the $4027.29 set-off against the note, but that $16,108.49 was a preference. (Rec., p. 7.)

On review, the District Judge decided that all these amounts were preferences, and entered a decree for the sum of $20,476.79, with interest from December 5, 1929. (Rec., pp. 21, 24.)

On appeal, the Circuit Court of Appeals for the First Circuit reversed the decree of the District Court, leaving the trustee to proceed by a plenary suit in a court of competent jurisdiction. (Rec., p. 118.)

The Circuit Court of Appeals for the First Circuit reversed the decree of the District Court on the ground *that the Referee in Bankruptcy had no jurisdiction to hear a preference suit.*

The case is here on petition for a writ of certiorari.

Argument.

I.

A REFEREE HAS NO JURISDICTION TO HEAR A PREFERENCE CASE.

Weidhorn v. Levy, 253 U. S. 268.

"We find nothing in the provisions of the Bankruptcy Act that makes it necessary or reasonable to extend the authority or jurisdiction of the referee beyond the ordinary administrative proceedings in bankruptcy."

Sec. 23 (b) expressly excepts suits for preferences from the conference of jurisdiction upon the Court *by consent.*

Collette v. Adams, 249 U. S. 545.

"The exception ingrafted in sec. 23 (b) takes such suits out of the restricted provisions of that section; the sentence added to sec. 60 (b) makes them cognizable in the *Courts of Bankruptcy.*"

Sec. 60 (b) confers jurisdiction for the recovery of a preference "on any court of bankruptcy."

Sec. 1A (8). "Courts of bankruptcy" means the District Court, and does not include the Referee.

In re Walsh Bros., 21 A. B. R. 14; 163 Fed. 352.
In re Ballou, 33 A. B. R. 21, at 25; 215 Fed. 810.

> "But though such a suit can be brought in this court with the consent of the corporate petitioner, it cannot be brought before the referee with such consent. The jurisdiction conferred by that section on the District Court cannot be exercised by the referee."

In re Overholzer, 23 A. B. R. 10.

And all of said cases are approved by this Court in the *Weidhorn* case.

The District Court fails to distinguish between "*courts of Bankruptcy*" and "*court*" as defined in the Bankruptcy Act.

"Court" (sections 1 (a)-7) includes Referees, but "courts of bankruptcy" (sections 1 (a)-7) does not include Referees.

Congress has been very careful in the use of these words in the Bankruptcy Act, and where the Referee is not to be included, the words "court of bankruptcy" are always used. (See sections 2, 12 (b), 21 (a) and 34 (a).)

The Circuit Court of Appeals for the First Circuit correctly interpreted the Statute.

(a)

No agreement of parties can confer jurisdiction.

Shwartz v. Kaplan, 50 Fed. (2d) 947.
Nixon v. Michales, 38 Fed. (2d) 420.

This was a controversy between strangers to the bankruptcy, heard and decided by the Court of Appeals, and, on rehearing, the case was dismissed on the ground that there was no jurisdiction, and there could be no jurisdiction by consent.

Chi. B. & Q. Ry. Co. v. Willard, 220 U. S. 413.

II.

THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH THE DECISION OF ANY OTHER CIRCUIT.

The only question decided by the Court of Appeals was whether or not the Referee had jurisdiction, and the Court, following *Weidhorn v. Levy,* 253 U. S. 268, correctly decided that the Referee was without jurisdiction to hear a preference case.

The only other question raised, was a question of fact, as to whether or not the Plymouth County Trust Company, in setting off certain funds, received a recoverable preference.

The law on this question has been definitely settled by this Court, and the only matter that the lower Court had to decide was the proper application of the law to the facts.

Studley v. Boylston National Bank, 229 U. S. 523.
New York County Bank v. Massie, 192 U. S. 138.

In order to deprive the bank of its right of set-off, there must be collusion between the depositor and the bank, participated in by both.

Gardner Sav. Bank & Tr. Co. v. Loeb, 188 Fed. 285.
Rupp v. Commerce Guardian Trust & Sav. Bk., 32 Fed. (2d) 234.

(a)

The bank had a banker's lien on the checks when they were deposited.

Joyce v. Antem, 179 U. S. 591, at 597.

"It is familiar law that a bank receiving notes for collection is entitled, in the absence of a contract expressed or implied to the contrary, to retain them as security for a debt of the party depositing the notes."

(b)

There was no evidence to prove the insolvency of Craig, Reed & Emerson, Inc., on July 12, 13, 14 and 15, 1929, the dates of the alleged deposits.

"A person shall be deemed insolvent within the provisions of this Act, whenever the aggregate of his property . . . shall not, at a fair valuation, be sufficient in amount to pay his debts."
Bankruptcy Act, sec. 1, cl. 15.

"A fair valuation means the actual value . . . its real market value . . . It is what the property would sell for in the regular course of business, but not what the property would sell for at forced sale."
Loveland (4th ed.) p. 302.

"A man's property at a fair valuation may amount to sufficient to pay his debts, although he might not be able to realize at once the amount of that valuation."
Duncan v. Landis, 106 Fed. 839, 859.

"The valuation for a test of solvency or insolvency under the issue, must relate to the conditions as a going concern when the alleged preference was given, and not to the mere dead matter of the plant after bankruptcy intervened."
Butler Paper v. Goembel, 143 Fed. 295, 297.

The assignee, on August 21, 1929, issued a statement to all creditors, showing that Craig, Reed & Emerson, Inc., was perfectly solvent. (Exhibit 10, p. 104A.)

Conclusion.

It is respectfully submitted that the decision of the Circuit Court of Appeals is correct, and the Petition for Certiorari should be denied.

Respectfully submitted,

JOSEPH B. JACOBS,
Attorney for the Respondent.

Of Counsel:
HERBERT C. THORNDIKE,
JACOBS & JACOBS.

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Supreme Court of the United States

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v.

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Respondent Herein.

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Attorney for Respondent.

Of Counsel:
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LAWYERS' BRIEF & PUBLISHING CO.
BOSTON, MASS.

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Craig, Reed & Emerson, Inc. owed $36,500 for some time to the Plymouth County Trust Company, (Rec. p. 83). On March 8, 1927, the loan was changed from a time loan to a demand loan. (Rec. p. 83.)

Craig, Reed & Emerson, Inc. had its checking account at the Plymouth County Trust Company, and made its deposits there.

In June, 1929, Mr. Cooper, the president of the Plymouth County Trust Company, was asked to come over to the Plymouth Development Company, the office of a Mr. Davis, a preferred stockholder of Craig, Reed & Emerson, Inc. When Mr. Cooper arrived at the office of the Development Company, Messrs. Reed, Field and Craig, officers of Craig, Reed & Emerson, Inc. were there, as were the directors of the Plymouth Development Company.

Mr. Davis said that "the object of the meeting was to determine the best way to continue the business of Craig, Reed & Emerson, Inc. for the next few months at the smallest possible loss." (Rec. p. 58.)

Mr. Cooper, although present, did not speak (Rec. pp. 58, 59), and did not agree to anything. (Rec. p. 85.)

Subsequent to this conference, the business of Craig, Reed & Emerson, Inc. was conducted as usual, and deposits were made in the usual course of business by Craig, Reed & Emerson, Inc. in the Plymouth County Trust Company. (Rec. pp. 50, 51, 82.)

On July 11, 1929, Craig, Reed & Emerson, Inc. deposited in the Campello Branch of the Plymouth County

Trust Company $15,100.78 in the form of checks drawn on New York. (Rec. pp. 35, 45; Exhibit 5, p. 101.)

Either on the same day, or on the morning of the 12th of July, the checks arrived at the main office of the bank. (Rec. p. 45.)

On the 12th day of July, 1929, there was on deposit in the Plymouth County Trust Company to the account of Craig, Reed & Emerson, Inc., $5,140.87 collected funds (Rec. p. 69), and the uncollected checks of $15,100.78 drawn on New York.

On July 12, 1929, after the $15,100.78 checks arrived at the main office of the bank, the bank offset $4,027.29 and $15,100.78 and made proper entries on July 12, 1929, showing the offset of $4,027.29, but did not make the offsetting entries of the $15,100.78 checks until July 13th, when the checks had cleared. (Exhibit 6, p. 103; Rec. pp. 45, 69, 81.)

On July 12, 1929, $375 was also charged against Craig, Reed & Emerson, Inc., for rent due July 1st. (Rec. pp. 43, 44, 47, 48, 73.)

On July 15, 1929, $1,348.72 was set-off by the bank, which was the amount of the balance remaining in the bank from July 12th in collected funds, plus uncollected checks of $346.76 and $316.56 deposited on July 15th. (Rec. pp. 41, 42.)

On July 16, 1929, Craig, Reed & Emerson, Inc. made a general assignment for the benefit of its creditors to L. H. Hall, assistant treasurer of the Plymouth County Trust Company (Rec. p. 25), and on the 28th day of Sep-

tember, 1929, an involuntary petition in bankruptcy was filed against Craig, Reed & Emerson, Inc. The company was adjudicated bankrupt on the 14th day of October, 1929, and subsequently Walter J. MacDonald was appointed trustee. (Rec. p. 1.)

The trustee filed a petition with the referee in bankruptcy to have the Trust Company turn over to him $20,476.79, claiming the same to be preferences. (Rec. p. 2.)

The Trust Company consented to the jurisdiction of the Referee, with the understanding that it was to be tried as a plenary suit. (Rec. pp. 24, 115.)

The Referee decided (Rec. pp. 6, 7) that the Trust Company had the right to set-off the rent of $375 and the $4,027.29 set-off against the note, but that $16,108.49 was a preference. (Rec. p. 7.)

On review, the District Judge decided that all these amounts were preferences, and entered a decree for the sum of $20,476.79, with interest from December 5, 1929. (Rec. pp. 21, 24.)

On appeal, the Circuit Court of Appeals for the First Circuit reversed the decree of the District Court, leaving the trustee to proceed by a plenary suit in a court of competent jurisdiction. (Rec. p. 118.)

The Circuit Court of Appeals for the First Circuit, reversed the decree of the District Court on the ground *that the Referee in Bankruptcy had no jurisdiction to hear a preference suit.*

The trustee in bankruptcy filed a petition for certiorari, which was granted, and the case is here for argument thereon.

Assignment of Errors.

The assignment of errors presents the following questions:

1. Was there any evidence to warrant the finding that Craig, Reed & Emerson, Inc. was insolvent on the 12th, 13th, 14th or 15th of July, 1929?

2. Was the set-off of $4,027.29 on July 12, 1929, a preference?

3. Was the set-off of the rent of $375 on July 12, 1929, a preference?

4. Was the set-off of the proceeds of the $15,100.78 checks received by the bank on July 11, 1929, a preference?

5. Could the parties, by consent, confer jurisdiction on the Referee to hear a plenary suit to recover a preference?

Argument.

I.

There was no evidence to prove insolvency of Craig, Reed & Emerson, Inc., on July 12, 13, 14, or 15, 1929.

> "A person shall be deemed insolvent within the provisions of this Act, whenever the aggregate of his property . . . shall not, at a fair valuation, be sufficient in amount to pay his debts."
>
> *Bankruptcy Act,* sec. 1, cl. 15.

> "A fair valuation means the actual value . . . its real market value . . . It is what the property would sell for in the regular course of business, but not what the property would sell for at forced sale."
>
> *Loveland* (4th ed.) p. 302.

> "A man's property at fair valuation may amount to sufficient to pay his debts, although he might not be able to realize at once the amount of that valuation."
>
> *Duncan v. Landis,* 106 Fed. 839, 861.

> "The valuation for a test of solvency or insolvency under the issue, must relate to the conditions as a going concern when the alleged preference was given, and not to the mere dead matter of the plant after bankruptcy intervened."
>
> *Butler Paper v. Goembel,* 143 Fed. 295, 297.

There was not a scintilla of evidence showing what the value of the assets was on July 12, 13, 14 or 15, 1929. To be sure, there is a statement of the witness, Craig, that "there was no substantial change in the affairs of the company between July 16th and August 21st." (Rec. p. 92.)

There was the further evidence that the assignee, on August 21, 1929, issued a statement to the creditors showing that the assets were $88,531.36 and the liabilities were $58,016.36. (Rec. pp. 16, 26, 92, 94; Exhibit 10, p. 104a.)

The assignee conducted the business and then sold the assets, apparently at private sale, on the 27th day of September, 1929, (Rec. pp. 27, 28, 29), the day before the filing of the involuntary petition in bankruptcy. There was no evidence introduced to show that the fair value of the assets was the same on September 27, 1929, as on July 12, 1929, nor was there any evidence to show that there had not been a material change.

Over the objections of counsel for the appellee (Rec. pp. 29, 30) the purchase price of $14,330.61 was admitted.

The Referee adopted this purchase price as the fair value of the assets on July 12, 1929, without the introduction of any evidence to enable him to reach that conclusion, and he also used the schedules in bankruptcy as evidence, without their having been introduced as an exhibit. (Rec. p. 17.).

Fair valuation does not mean "scrap or wrecker's value," and the admission of the purchase price without being further connected with the fair value at the date of the alleged preferences was erroneous.

Eaton v. Standard Oil Co., 100 Conn. 443.
Swartz v. Frank, 183 Mo. 438,

where the Court says:

> "The general rule of law is that a state of facts once shown to exist is ordinarily presumed to continue

so to exist until the contrary is shown. But this presumption is not retrospective . . . The Court has no more right to presume that the company had the same amount of stock on hand on December 19th as it was shown to have had on December 26th than it would have to presume that the amount on hand on December 19th was either greater or smaller than the amount on hand on December 26th . . . *The law requires proof and does not indulge in speculation.*" [Italics ours.]

The trustee, in order to prevail, must prove as part of his case what the fair value was of the assets on *the date* of the alleged preference. This is part of the burden which he assumed.

II.

The set-off of $4027.29 was not a preference.

Admittedly there was on deposit in the Plymouth County Trust Company on the 12th day of July, 1929, to the credit of Craig, Reed & Emerson, Inc., $5140.87 in collected funds. (Rec. p. 69, Exhibit 6.)

Admittedly there was no collusion between Craig, Reed & Emerson, Inc. and the bank; Craig, Reed & Emerson, Inc. did not make deposits for the purpose of preferring the bank, and the bank did not solicit or prevail upon the depositor to make deposits so that it could be preferred. The deposits creating this balance were made in the usual course of business. (Rec. pp. 82, 89, 59, 60.)

The Referee has found that this set-off of $4027.29 was not a preference. (Rec. pp. 6, 7.) The District Judge, however, disallowed the set-off, believing that *Bailey v. Merrimac National Bank,* 283 Fed. 514, 516 (affirmed 289 Fed. 468), governed the case. (Rec. p. 24.)

In the *Merrimack* case a creditors' committee *took charge* of the company's business, and the bank consented to an extension. The Court found that the bank did not act in good faith, and further that there was no usual course of business, as the insolvent's business was then shut down.

The case of *Citizens National Bank of Gastonia v. Lineberger,* 45 Fed. (2d) 522, seems to be almost identical with the case at bar, and follows the decision in the case of *New York County Bank v. Massey,* 192 U. S. 138, where the Court said:

> "There is nothing in the findings to show fraud or collusion between the bankrupt and the bank with a view to create a preferential transfer of the bankrupt's property to the bank, and in the absence of such showing, we cannot regard the deposit as having other effect than to create a debt to the bankrupt and not a diminution of his estate."

The Court further held that an ordinary deposit in the bank "is not a transfer."

Studley v. Boylston National Bank, 229 U. S. 523.

III.

The set-off of $375 for rent was not a preference, as it was the usual way in which the rent was handled, and this $375 set-off was merely a set-off for the rent which fell due July 1, 1929 (Rec. pp. 47, 48).

IV.

The set-off of the proceeds of the $15,100.78 checks was not a preference.

There was no collusion between the bank and the depositor with reference to the deposit of the $15,100.78 in checks in the Campello branch of the bank on July 11, 1929. The officials of the bank did not even know that the checks had been received at the branch until they were received at the main office of the bank on July 12th, (Rec. pp. 89, 90.)

The Referee's certificate and findings thereon are based on the erroneous premise that the receipt of the $15,100.78 in checks was after the memorandum, to wit: "Show all checks and deposits to Mr. Crocker" had been put on the ledger card (Exhibit 6).

An analysis of the testimony shows that a Mrs. Mills placed that memorandum on the card upon the instructions of Mr. Crocker, a vice president of the bank. Mr. Crocker testified that the memorandum was put on some time after July 13th (Rec. p. 76), because he had it put there in order to enable him to see that the laborers' checks were paid (Rec. p. 77) as "one of the laborers had obtained counsel and was about to start suit on the check" (Rec. p. 77).

Mrs. Mills, on cross examination, emphatically testified (Rec. p. 64) that she could not tell the exact date when the memorandum was put on.

This is all the testimony with reference to the date of the memorandum.

(a)

THE BANK HAD A BANKER'S LIEN ON THE CHECKS WHEN THEY WERE DEPOSITED.

Joyce v. Anten, 179 U. S. 591 at 597:

"It is familiar law that a bank receiving notes for collection is entitled, in the absence of a contract expressed or implied to the contrary, to retain them as security for a debt of the party depositing the notes."

Jones on Liens, sec. 242:

"The lien of bankers is part of the law merchant, and the courts are bound to take judicial notice of it, just as they are bound to recognize the negotiability of bills of exchange."

Prudential Realty Co. v. Commissioner of Banks, 241 Mass. 277, 279.

National Bank v. Insurance Co., 104 U. S. 54, at 71.

Studley v. Boylston National Bank, 229 U. S. 523.

Furber v. Dane, 203 Mass. 108 at 117:

"There is no doubt that under ordinary circumstances, a bank has the right to apply the deposit of an insolvent debtor toward the payment of its claim against him . . . This right of detention or banker's lien, as it is some times called, attaches upon the securities and moneys of the customer deposited in the usual course of business for advances which are supposed to have been made upon their credit."

Kane et al. v. First National Bank of El Paso, Texas, C. C. A. 5th, decided March 3, 1932, No. 6258 (not reported as yet.)

(b)

THE BANK HAD THE RIGHT TO OFFSET THE PROCEEDS.

New York County Bank v. Massey, 192 U. S. 138.
Studley v. Boylston National Bank, 229 U. S. 523.

Fourth National Bank v. Smith, 240 Fed. 19:

"Knowledge by the bank of the insolvency of the depositor at the time of making the set-off does not invalidate the set-off. Indeed, in most cases, such knowledge is the very reason for making the set-off . . . In the *Massey* case . . . the bank knew of the insolvency of the depositor before the set-off was made."

In order for the bank to be deprived of its right of set-off, there must be collusion between the depositor and the bank, participated in by both.

Germania Savings Bank & Trust Co. v. Loeb, 188 Fed. 285; 26 A. B. R. 238:

"A careful consideration of the records constrains us to the opinion that there was no fraud or collusion between the bank and the bankrupt for the purpose of creating a preferential transfer with respect to the deposit balance in question. It is not, and could not be contended that there was any collusion in respect to creating this balance."

At 247, the Court says:

"It is true that on and after the 5th day of February, the bank had reason to believe that the Mercantile Company was insolvent. It is also true that the application upon the bank's debt of this balance of deposit, accumulated after notice of possible insolvency of the Mercantile Company, in fact enables

the bank to obtain a greater dividend on its claim than creditors generally obtained. But unless it was the intention of the parties to so accumulate the deposits for the purpose of preferring the bank, the transaction did not create a preference under the Bankruptcy Act. This view is supported by the case of *New York County Bank v. Massey, (supra).* As before remarked, a considerable portion of the deposits allowed as a set-off in that case was made after actual knowledge on the part of the bank of the insolvency of its customer."

Rupp v. Commerce Guardian Trust & Savings Bank, 32 Fed. (2d) 234; 14 A. B. R. 1, at 2:

"This balance was accumulated in the bank in the usual course of business, and was not built up or deposited for the purpose of giving a preference to the bank. At the time it was applied to the indebtedness of the Milling Company that company was insolvent. We have no doubt of the right of the bank to make the application upon that basis . . . and it was immaterial to the existence of this right that the debts were not due, as under Sec. 68A of the Bankruptcy Act, the right of set-off is preserved as to provable debts, whether due or not."

V.

A referee has no jurisdiction to hear a preference case.

Weidhorn v. Levy, 253 U. S. 268.

"We find nothing in the provisions of the Bankruptcy Act that makes it necessary or reasonable to extend the authority or jurisdiction of the referee beyond the ordinary administrative proceedings in bankruptcy."

Sec. 23 (b) expressly excepts suits for preferences from the conference of jurisdiction upon the Court *by consent.*

Collette v. Adams, 249 U. S. 545.

> "The exception ingrafted in sec. 23 (b) takes such suits out of the restricted provisions of that section; the sentence added to sec. 60 (b) makes them cognizable in the *Courts of Bankruptcy.*"

Sec. 60 (b) confers jurisdiction for the recovery of a preference "on any court of bankruptcy."

Sec. 1A (8). "Courts of bankruptcy" means the District Court, and does not include the Referee.

In re Walsh Bros., 163 Fed. 352.

In re Ballou, 215 Fed. 810.

> "But though such a suit can be brought in this court with the consent of the corporate petitioner, it cannot be brought before the referee with such consent. The jurisdiction conferred by that section on the District Court cannot be exercised by the Referee."

In re Overholzer, 23 A. B. R. 10.

And all of said cases are approved by this Court in the *Weidhorn* case.

The District Court fails to distinguish between "courts of bankruptcy" and "court" as defined in the Bankruptcy Act.

"Court" (sections 1 (a)-7) includes Referees, but "courts of bankruptcy" (sections 1 (a)-7) does not include Referees.

Congress has been very careful in the use of these words in the Bankruptcy Act, and where the Referee is not to be included, the words "court of bankruptcy" are always used. (See sections 2, 12 (b), 21 (a) and 34 (a).)

Daniel v. Guaranty Trust Co., U. S. Supreme Court, decided March 14, 1932.

(a)

NO AGREEMENT OF PARTIES CAN CONFER JURISDICTION.

Shwartz v. Kaplan, 50 Fed. (2d) 947.
Nixon v. Michales, 38 Fed. (2d) 420.

This was a controversy between strangers to the bankruptcy, heard and decided by the Court of Appeals, and, on rehearing, the case was dismissed on the ground that there was no jurisdiction, and there could be no jurisdiction by consent.

Chi. B. & Q. Ry. Co. v. Willard, 220 U. S. 413.

Conclusion.

It is respectfully submitted that the decision of the Circuit Court of Appeals is correct, and should be affirmed.

Respectfully submitted,

JOSEPH B. JACOBS,
Attorney for the Respondent.

Of Counsel:
HERBERT C. THORNDIKE,
JACOBS & JACOBS.

SUPREME COURT OF THE UNITED STATES.

No. 714.—October Term, 1931.

Walter J. MacDonald, Trustee in Bankruptcy of Craig, Reed & Emerson, Inc., Petitioner,
vs.
Plymouth County Trust Company.

On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[May 16, 1932.]

Mr. Justice Stone delivered the opinion of the Court.

In a bankruptcy proceeding pending in the District Court for Massachusetts, the trustee in bankruptcy, the petitioner here, filed a petition with the referee to set aside certain alleged transfers of property by the bankrupt to the respondent as voidable preferences within the provisions of § 60 (b) of the Bankruptcy Act. The respondent appeared in the proceeding, denied the material allegations of the petition, but consented in open court that the trial of the issues proceed before the referee. The referee made an order, based on findings, granting in part the relief prayed. The District Court, on cross petitions to review the determination of the referee, modified his order in respects not now material. 46 F. (2d) 811. On appeal the Court of Appeals for the First Circuit reversed the order of the District Court, holding that as the issues before the referee were determinable only in a plenary suit, the referee, notwithstanding the consent of the parties, was without jurisdiction to decide them. 53 F. (2d) 827. This Court granted certiorari, — U. S. —, to resolve a conflict of the decision below with that in *In re Hopkins* (C. C. A. 2d), 229 Fed. 378; see also *Arkansas Natural Gas Corp.* v. *Page*, 53 F. (2d) 27; *American Finance Co.* v. *Coppard* (C. C. A. 5th), 45 F. (2d) 154; *Board of Education* v. *Leary* (C. C. A. 8th), 236 F. 521; *Gamble* v. *Daniel* (C. C. A. 8th), 39 F. (2d) 447, appeal dismissed, 281 U. S. 705.

The only question, presented by the petition, which need be considered here, is whether, the issues raised being such as were triable in a plenary suit, the referee, the parties consenting, had juris-

diction to determine them. Under the applicable provisions of the Bankruptcy Act, the District Court below had jurisdiction to hear and determine the present suit. Section 60 (b) of the Bankruptcy Act confers on trustees in bankruptcy authority to maintain plenary suits to set aside voidable preferences as defined in that section. Section 23 (b), as originally enacted, provided, "Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant". An amendment of this section in 1903 removed its restrictions on suits brought under § 60 (b) by adding the words "except suits for the recovery of property under section sixty, subdivision b; . . ." At the same time § 60 (b) was amended, so as to confer jurisdiction over suits by the trustee to set aside voidable preferences in "any court of bankruptcy". By § 1 (8) "courts of bankruptcy" includes District Courts.

Jurisdiction over the present suit being thus vested in the District Court as a court of bankruptcy, the question with which we are immediately concerned is whether the referee appointed by the District Court where the bankrupt's estate is being administered, is a court within the meaning of § 23 (b), and is included in the phrase "any court of bankruptcy" in § 60 (b), and hence is vested with such jurisdiction that, the defendant consenting, he may try and determine the issues in the suit.

That he may not try such issues without the consent of the defendant has been often and uniformly held, *Louisville Trust Co.* v. *Comingor,* 184 U. S. 18, 26; *Babbitt* v. *Dutcher,* 216 U. S. 102, 113; *Weidhorn* v. *Levy,* 253 U. S. 268, 273; *Harrison* v. *Chamberlin,* 271 U. S. 191, 193; see also *Daniel* v. *Guaranty Trust Co.,* — U. S. —, decided March 14, 1932. In cases where the defendant made timely objection to a determination by the referee, it has been said that the referee is without power to hear the issues involved in a plenary suit, and that such a suit, if brought before him, must be dismissed for want of jurisdiction. See *Weidhorn* v. *Levy, supra.*

But a distinction is to be noted between the power of the referee to decide the issues in such a suit brought before him without objection, and his power to compel the litigation of them before him, over the objection of the proposed defendant. Where a suit by

the trustee is plenary in character, as are those authorized by § 60 (b), both parties to it are entitled to claim the benefits of the procedure in a plenary suit, not available in the summary method of procedure which, under the provisions of the Bankruptcy Act, is employed by the referee. A denial of those benefits would be in effect a denial of the right to a plenary suit, to which both parties are entitled under § 60 (b). But it does not follow that this privilege, extended for the benefit of a suitor, may not, like the right to trial by jury, be waived, see *Harrison* v. *Chamberlin, supra;* cf. *Patton* v. *United States,* 281 U. S. 276, and, being waived, that the referee is without the power given to courts of bankruptcy to decide the issues.

This Court has intimated, although it has never decided, that the referee may, if the parties consent, try the issues which must otherwise be tried in a plenary suit brought by the trustee. See *Taubel-Scott-Kitzmiller Co.* v. *Fox,* 264 U. S. 426, 431, 433, 434; *Harrison* v. *Chamberlin, supra.* See also, *Foster* v. *Manufacturers' Finance Co.,* 22 F. (2d) 609. And we can perceive no reason why the privilege of claiming the benefits of the procedure in a plenary suit, secured to suitors under § 60 (b) and § 23 (b), may not be waived by consent, as any other procedural privilege of the suitor may be waived, and a more summary procedure substituted. Cf. *Chicago, B. & Q. Ry. Co.* v. *Willard,* 220 U. S. 413, 419-421.

But the question remains, whether, the privilege of trial by plenary suit being waived, the referee possesses the power which courts of bankruptcy possess to hear and determine the issues presented. Section 23 (b), before its amendment, contemplated that the restrictions upon the choice of a court for the maintenance of suits by the trustee should be removed by consent of the proposed defendant. That is still its effect with respect to suits not enumerated in the amendment. Section 1 (7) provides that "'court' shall mean the court of bankruptcy in which the proceedings are pending, and may include the referee". By the two sections read together, the District Court in which the proceeding is pending is designated as a court where the trustee may bring the suit if consented to, and that court "may include the referee", to whom it has referred the proceeding.

Whether "courts" in § 23 (b), should be taken to include the referee, as § 1 (7) permits, is to be determined in view of the fact

that under § 23 (b), as originally enacted, and in many instances since its amendment, the jurisdiction, either of court or referee, may be invoked only on consent, and that in any case plenary suits may not be summarily tried by the referee without consent. Section § 38 (a) (4) contemplates that referees within their districts may be invested with the powers of courts of bankruptcy except as to questions relating to the discharge of the bankrupt, and General Order XII directs that after the appointment of the referee all proceedings shall be had before him except such as are specifically required to be had before the judge. These provisions, read in the light of the object sought to be attained by the Bankruptcy Act, and more particularly by § 23 (b) and § 60 (b) as amended, lead to the conclusion that the word "courts" as used in § 23 (b) and the words "any court of bankruptcy" in § 60 (b) must be taken to include the referee and vest in him the power possessed by courts of bankruptcy under §§ 23 (b) and 60 (b), to decide the issues in a suit brought under § 60 (b), where the parties join in presenting them to him for determination. While under the provisions of the Bankruptcy Act the exercise of his jurisdiction by the referee is ordinarily restricted to those matters which may be dealt with summarily by the method of procedure available to referees in bankruptcy, the restriction may be removed, as it was here, by the consent of the parties to a summary trial of the issue presented. The referee therefore had power to decide the issues, and the Court of Appeals below should have considered the appeal on its merits.

The decree is reversed and the cause remanded to the Circuit Court of Appeals for further proceedings in conformity with this opinion.

A true copy.

Test:

Clerk, Supreme Court, U. S.